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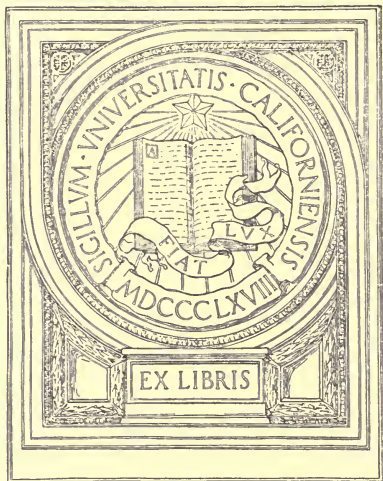
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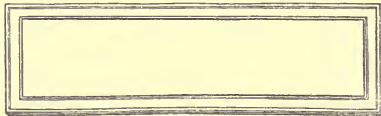
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PREFACE TO THE SECOND EDITION.

THE first edition of this Work having been exhausted, and in view of the alteration of the law by the introduction of the *Mines Act* 1897, and the decisions of the Supreme Court in mining cases during the last ten years, a demand has arisen for a second edition, in order to bring the Work up to the present date. To make the volume more complete and comprehensive, references have been introduced and numerous cases quoted throughout the text bearing on the law of gold-mining in the other States of Australia and in New Zealand, as well as references to the Acts of those States; and in addition, the Victorian Acts appearing in the Appendix have been carefully annotated to facilitate comparison with the various Mining Acts now in force throughout the States.

Whilst retaining the original plan of the first edition, it has been found necessary to re-construct and re-write the whole of the Work, which, in its present form, though dealing principally with the law of gold-mining in Victoria, may be regarded as illustrating the mining law of the whole of Australasia.

Kyneton, Vic.,
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PREFACE TO THE FIRST EDITION.

WITH the exception of Atkins's Notes to the Mining Statute and McFarland's admirable Digest, no work devoted entirely to the Law of Mining in Victoria has been published; and as, since the last publication of the Digest in 1881, various changes have taken place in the statute law, and numerous judgments have been delivered expounding that law, it is considered that this work will be found useful to the members of the profession as well as to others holding or acquiring mining interests.

A work of this nature, though the result of the study and practice of a number of years, must necessarily be imperfect in many respects. When consideration is given to the fact that the whole of our mining law is founded on statutes for which no precedent existed in any other country; that such statutes were made and repealed from time to time as occasion required; that judgments on the construction of an Act since repealed do not necessarily apply to an existing Act: that many of the judgments are based on the constructions of by-laws, which have been successively amended or repealed; and that the author's task was not only to reconcile as far as possible the numerous decisions upon which the construction of our mining law is based, but to weave together into one strand the various sources from which such law is derived—to compare the many statutes, by-laws and regulations which form the mining code of the colony—and to eliminate

therefrom such portions as have become obsolete or useless; it is felt that no apology is necessary for any errors or omissions which may have occurred in the performance of the task.

As the Mining Law in Victoria is a law standing by itself, originating within the colony, and not in any way affected by the decisions of the English courts (except as regard appeals to the Privy Council), reference has been made only to cases arising within the colony, and decided by the Victorian courts. Each of these cases has been carefully studied, whether it be in connection with the statutes or with the by-laws under which the cases arose; the Digest of the Reported Cases has been utilized where the head lines of the reports have seemed to constitute a fair digest of the cases, but these headlines have not been implicitly relied on by the author without having been carefully examined with the reports they refer to.

The law of mining companies does not come within the scope of this work, and has not been touched upon, except so far as a company may be considered as the holder of a claim or a lease, or as a party to a suit. It was also found necessary to considerably curtail the chapters on the Procedure and Practice of the Mining Courts, in order to keep within the prescribed limits of the volume. For these, however, the reader is referred to the Act itself and to the rules thereunder, which must in any event form the basis of the procedure of the courts.

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A.L.R.	Argus Law Reports (Vic.)
A.L.R. (C.N.)	Argus Law Reports (Current Notes)
A.L.T.	Australian Law Times (Vic.)
App. Cas.	Law Reports Appeal Case
A.R. or Argus	Argus Newspaper Reports (Vic.)
C.A.	Court of Appeal
Ex.	Exchequer Reports
F.C.	Full Court
Knox	Knox's Reports (N.S.W.)
Hore Dig.	Hore's Digest of Tasmanian Cases
L.J.P.C.	Law Journal Reports Privy Council
L.T.	Law Times
Mac.	Macassey's Reports (N.Z.)
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CORRIGENDA.

The Leasing Regulations of 1897 having been revised after Book II was in type, the following *corrigenda* become necessary :—

- At page 159, note (a), add “revised to 13th August, 1900.”
- „ 160, fifth line from top, for “seven” read “ten.”
- „ 166, fourth line from top, make the same correction.

THE
LAW OF GOLD MINING,
&c.

INTRODUCTORY.

THE growth of a law in a new country, and under new conditions, will naturally develop with the growth of the necessity which requires that law. So it was with the first Mining Law of Victoria from the time of the first gold-fields proclamation in August, 1851, up to the date of the present extensive mining code of the State, numerous Acts having been passed and regulations made successively, as occasion arose from time to time for any amendment of or addition to the existing law.

Introductory.
Growth of the
Mining Law.

At the time of the first discovery of gold no mining law whatever was in existence in New South Wales, of which Victoria then formed a part, and the first gold-fields law of the colonies was contained in a proclamation issued on August 15th, 1851, notifying that any person taking from

First gold-fields
proclamation.

Introductory. any lands within the colony any gold or gold ore, or digging or disturbing the soil in any lands then unalienated from the Crown without being duly authorized to do so would be prosecuted.

Licence to mine. The authority referred to was given by licence to take up as a claim in which to mine for gold a small area of Crown land limited by the proclamation on payment of a monthly fee to the Crown. The term and fee of this licence were subsequently altered from time to time, as was also the area allowed to be taken up or pegged out. This licence was required to be produced by its owner whenever he should be called upon to produce it, and the many harassing searches made for these licences, and the arrest of numerous diggers who failed to produce them when called on, known at the time as "digger-hunting," gave rise to many serious outbreaks amongst the miners on the various diggings of the colony, which culminated in the formidable Eureka riot at Ballarat.

The first Mining Act. But though every attention was devoted by the Government to the protection of the revenue derived from these mining licences, yet the miner himself had no redress beyond physical force against the trespasser who jumped or encroached on his claim; and it was not until January, 1852, that any legal means was available for the settlement of disputes between diggers with regard to trespass and encroachment. This means of redress was, however, granted to a certain extent by the first Mining Act of the colonies, which was passed in January, 1852 (*a*), and which authorized the appointment of certain officers called Gold Commissioners, who were empowered to enquire into disputes between miners and determine them in a summary way.

Second Mining Act. The powers of the Gold Commissioners were enlarged by an Act passed in the following year (*b*), which also authorized two justices of the peace to award compensation for encroach-

(*a*) 15 Vic. No. 15—"An Act to restrain by summary proceedings unauthorized mining on waste lands of the Crown."

(*b*) 17 Vic. No. 4—"An Act for the better management of the gold-fields of the Colony of Victoria."

ment and trespass to an amount not exceeding £200, and also to hear and settle disputes between mates or partners. Introductory.

This method of dealing out justice was of the roughest fashion, and there was no appeal from a determination once given. The Gold Commissioner, an officer whose place was subsequently filled by the Chairman of the Local Court and afterwards by the Warden (*c*), held his rough court where he pleased, and usually settled any dispute by visiting the claims and giving his decision on the spot, and that decision was final and conclusive. Gold Commissioners.

A subsequent Act (*d*), passed in June, 1855, repealed the previous Act and abolished the licence to mine, substituting for it the "miner's right" in a somewhat similar form to the document now issued, and also authorizing the issue of business licences and mining leases. The office of Gold Commissioner was also abolished, and for the administration of mining law local courts were instituted, consisting of a chairman appointed by the Governor and nine holders of miners' rights, who were elected by the great body of miners in the local court district. These local courts had power to frame regulations in the nature of by-laws to regulate the taking up and working of claims and the settlement of disputes between miners. By proclamation made on June 29th, 1855, five mining districts were named, each of which had its local court instituted as above. Miner's right. Local courts.

The *Goldfields Act* (*e*), which came into operation on June 1st, 1858, effected a still further reform in the mining law. It was by this Act that Wardens of the Goldfields were created, with jurisdiction to decide cases of title to claims, encroachment and trespass, forfeiture and abandonment, subject to the right of appeal from their decisions to the District Courts of Mines, which were also first created by this Act, and from which latter courts a right of appeal The Gold-fields Act, No. 32.

(c) He is still called the Commissioner in Tasmania; 57 Vic. No. 24 (Tas.), sec. 8.

(d) 18 Vic. No. 37—"An Act to

amend the law relating to gold-fields."

(e) 21 Vic. No. 32.

Introductory. lay to the Supreme Court. The Act also authorised the appointment of elective bodies called Mining Boards, on which were conferred power to make by-laws regulating the taking up and working of claims in place of the former local court regulations. The chairmen of the several local courts were appointed the first Wardens.

The Mining Statute 1865.

With the development of mining, however, this Act was found to fall short of the requirements of the gold-fields, and *The Mining Statute 1865*, the result of a Royal Commission on the mining industry, came into operation on January 1st, 1866 (*f*).

Principles of the Act.

The general principles of the Act No. 32 were adhered to in the new Act, by which, however, they were greatly enlarged and extended. The jurisdiction of the Warden and of the Court of Mines was more clearly defined, and a new Court of Appeal was erected, called the Court of the Chief Judge of Courts of Mines, to which court appeal might be had from the Court of Mines: and both the Warden and the Judge of the Court of Mines had the right of stating a special case on any question of law arising in any proceeding before him for the opinion of the Chief Judge. This new appellate court was, however, abolished by *The Judicature Act 1883* (*g*), and the jurisdiction given by *The Mining Statute 1865* to the Chief Judge is now vested in the Supreme Court.

Basis of the Mining Law.

The many weighty and lucid decisions and opinions of the Chief Judge of this new court in the numerous and complicated cases which were brought before him, and the judgments on the Equity side of the Supreme Court, have in a measure reduced the mining law of Victoria to a firm and settled basis, and though these opinions and judgments were given to meet cases applicable only to the time at which they were delivered, they nevertheless form a solid foundation for the superstructure of mining law which has been built up on them; and that not only for Victoria but

(*f*) 29 Vic. No. 291.

(*g*) 47 Vic. No. 761.

for the other States of Australia. "It is a well-known fact," *Introductory.* says Griffith, C.J. (*h*), "that the mining law of Australia was *In the other States.* practically made by the decisions of Mr. Justice Molesworth and the Supreme Court of Victoria. When, therefore, our legislature (Queensland) adopted in *The Goldfields Act 1874* (*i*) language identical with that which has received a settled interpretation for many years in the Supreme Court of Victoria, it must be taken, I think, that the legislature intended that the same meaning should be given to the words." *The Mining Statute 1865* (No. 291) is in fact the foundation of all the mining laws of Australasia, and still remains embodied practically in its original form in Part I of the *Mines Act 1890* of Victoria (*j*).

From the earliest times possession and occupation have *Possession and occupation.* always been regarded as the strongest title to a mining claim. "The title to mine on the Crown lands of Victoria from their first being let open to miners has been based on possession, the first person taking such possession under restrictions imposed being held to have the best right" (*k*). In fact the whole essence of *The Mining Statute* rests on two propositions: a title at law and occupation (*l*). The title is the miner's right, and the occupation is obtained by taking up in conformity with the by-laws; and this law obtains in all the States.

The various mining boards are within their several *Mining Boards.* districts authorized to limit the quantity of ground to be taken up, and to define the events in which claims shall be liable to forfeiture. A man may not take more ground than his miner's right entitles him to take. "The obvious general meaning of the Act," says Molesworth, Chief Judge (*m*), "is to enable all persons paying for documents called miners' rights a small tax—which may be quite disproportionate to

(*h*) *Theodore v. Theodore*, 8 Q.L.J. 76, F.C. (1897).

(*i*) 38 Vic. No. 11 (Q.)

(*j*) 54 Vic. No. 1120 (V.)

(*k*) *Per Molesworth, Chief Judge, in Warrior G.M. Co. v. Cotter*, 3

W.W. & A'B. (M.) 81 (1867).

(*l*) *Band of Hope & Albion Consols v. Young Band Extended Co.* (3), 9 V.L.R. (E.) 37; 4 A.L.T. 137 (1883).

(*m*) *Cawley v. Ling*, 6 W.W. & A'B. (M.) 12 (1869).

Introductory. the value of the property obtainable—to take possession of Crown lands and mine, the first person occupying thereby obtaining title. But it is obviously necessary for the interests of miners to prevent a first occupant taking more than a reasonable share of public property at under-value, and obstructing the industry of all others to whom equal encouragement was due.”

By-laws.

The mining law of Victoria as it at present exists has been established on the several Goldfields Acts and the by-laws. The latter are made (*n*) by the mining boards, the members of which live in and are acquainted with the mining districts they represent, and are mostly practical miners; and it has been the endeavour of the mining boards to make the by-laws as uniform as the exigencies of the several districts will permit. Uniformity in the by-laws as nearly as was possible was always urged by Mr. Justice Molesworth whilst acting as Chief Judge, their object being “to govern all property by the immovable principles of common law as far as applicable, and by the principles of equity as far as would meet the deficiencies of the common law, and to establish a sort of code as affecting the interests of all persons alike” (*o*). In all the other States except New South Wales regulations made by the Governor in accordance with the several Mining Acts take the place of mining board by-laws.

The frontage system.

Perhaps one of the best proofs of the usefulness of the by-law system can be found in the old frontage by-laws or local court regulations of Ballarat. The idea of frontage claims could only emanate from a practical miner; and though the frontage system has been for many years obsolete, except in a modified form, still there can be no doubt of the value of the system at the time it was introduced. The object of tracing and defining new leads was accomplished, and it was only with the progress of mining that the system became cumbersome. So long as the frontage

(*n*) 54 Vic. No. 1120 (V.), sec. 106.

(*o*) *Niemann v. Weller*, 3 W.W. & A'B. (E.) 125 (1866).

parallels covered only the lead on which the one frontage claim was registered no difficulty was experienced, but when litigation ensued in respect of boundaries to frontage claims, and claims on junctioned leads, or of the return of leads back within the frontage parallels from beyond the registered boundary, it was then seen that the system was inefficient. It was intended rather as a prospecting system than as a permanent working code, and as such it answered its purposes.

The decision of the Supreme Court in *Critchley v. Graham* (*p*) has always been strenuously adhered to by the courts, and the case may be regarded as a leading one in mining law. The policy of the mining laws of Victoria has been uniformly opposed to taking possession for mining purposes of unoccupied Crown land until any previous occupation shall have been determined by the decree of a court of justice. The case of *Critchley v. Graham* was decided under *The Goldfields Act* (No. 32), sec. 77. It was there held that in cases where there had been a forfeiture or a constructive abandonment of a claim, any person wishing to avail himself of such forfeiture or abandonment must take proceedings before the Warden in order to obtain possession, and that he could not enter on it as upon vacant ground; and the same principle has been expressed in *The Mining Act* of New Zealand (*q*). In *Barlow v. Hayes* (*r*) it was held that the legislature had adhered to the same policy when it passed *The Mining Statute* 1865 (No. 291), now in force in its consolidated form; and in *Mulcahy v. Walhalla Co.* (*s*) the Privy Council referred to a by-law of a district founded on the same policy as being "a most wise law, that no person should take possession by his own authority of any ground claimed to be occupied by any other person." The scope and consequence of these decisions are shown by the cases of *Moore v. White* (*t*) and *Beavan v.*

Introductory.

Critchley v. Graham.

(*p*) 2 W. & W. (L.), 211 (1863).
 (*q*) 62 Vic. No. 38 (N.Z.), sec.
 147.

(1867).

(*s*) 40 L.J.P.C. 41; 2 A.J.R. 93
 (1867).

(*r*) 4 W.W. & A'B. (M.), 67

(*t*) 4 A.J.R. 17 (1873).

Introductory. *Rigby (u)*, where it was laid down that even a Warden's order of forfeiture does not give a title to the forfeited land; that it merely clears away the old title, and establishes a right for miners to proceed to make a title for themselves by marking out the ground and registering as on a new title. The law as expressed in the latter decisions was, however, questioned in a recent case (*v*), but the principle was accepted as established, and the decisions were not over-ruled.

Act No. 446.

A later Act of Parliament (*w*) maintained the same policy whilst it qualified the legal rule. By sec. 27 of that Act (sec. 10 of No. 1120), a claim apparently unoccupied, and which has been unworked for a longer period than is allowed by the by-laws, shall be deemed abandoned, and may be taken up under a miner's right without an adjudication of forfeiture or abandonment, and subject to the rights, if any, of the previous occupant. The policy of the legislature, which has been happily termed a "peace preserving policy," forbids that land should be taken up under a miner's right so long as there is danger of collision with, or resistance by, a previous occupier. Where the fact of the termination of the tenancy is indisputable, and there is no one really in possession to contest the right of possession, such danger does not exist, and the ground may be taken up under a miner's right without previous adjudication (*x*).

Pegging out leased land.

The like rule applies where a contention in which a lessee has no part arises between two persons, one of whom has marked out the land for a claim before the expiration of the lease (*y*). But so long as a lessee is in apparent possession, and is present to defend his possession against strangers, the holders of miners' rights cannot intrude (*z*).

Coles v. Sparta.

The opinion of the Chief Judge in *Coles v. Sparta (a)*

(*u*) 2 V.L.R. (M.), 7 (1876).

(*v*) *Coates v. South Loch Fyne G.M. Co.* (2), 25 V.L.R. 543; 6 A.L.R. 62 (1900).

(*w*) 36 Vic. No. 446, incorporated with the *Mines Act* 1890.

(*x*) *Durant v. Jackson*, 1 V.L.R. (M.) 6 (1875).

(*y*) *Cooper v. White*, 4 V.L.R. (M.) 10 (1878).

(*z*) See the elaborate and exhaustive judgment of Higinbotham, J. in *Barwick v. Duchess of Edinburgh Co.*, 8 V.L.R. (E.) 70; 3 A.L.T. 68, 121 (1882).

(*a*) 3 W.W. & A'B. (M.) 21 (1866).

established a principle in mining law which was found to work so harshly that several of the mining boards introduced a by-law to meet the difficulty. In the case in question the defendants, occupiers of a claim, obtained protection registration for three months under the by-laws, and on the expiration of the time renewed their protection registration for a further term of three months. The plaintiffs having given them notice of intention to claim the ground by reason of forfeiture, the defendants at once proceeded to work without re-marking the ground but relying on their old title, and the plaintiffs applied to the Warden to be put in possession. On a special case stated, the opinion of the Chief Judge (*b*) was that the resuming work by the defendants without abandoning their old title and obtaining a fresh one did not cure the forfeiture previously incurred, irrespective of the necessity of stirring old pegs on claiming to hold old ground under a new title.

The same principle was maintained in the case of *Clerk v. Clerk v. Wrigley. Wrigley* (*c*) where the Chief Judge said, referring to the earlier case, "I feel the immense hardship and inconvenience of shaking titles to claims once subject to forfeiture and afterwards efficiently worked before process, and regret that the by-law fixed no limitation to the time of enforcing forfeiture. *Coles v. Sparta* rests upon peculiar circumstances. In cases merely under the Act No. 32 it might be said title consists in possession. A person whose title is forfeited has as good a right to take possession as other people—his resuming work is as good as a retaking of possession. But it is not so easy to apply such resuming under by-laws giving title, and providing for registration, &c."

But where a by-law was made to remedy this very defect, empowering steps to be taken to enforce a forfeiture so long as the ground of forfeiture continued, but providing that if before such steps were taken the claimholder resumed a proper working of his claim then his liability for past

Remedy by
by-law.

(*b*) Molesworth, Chief Judge, July 23, 1866.

(*c*) 4 W. W. & A' B. (M.) 74 (1867).

Introductory. delinquencies should cease, Webb, J., decided that the by-law was not *ultra vires*, and that a claimholder under it working his claim with the requisite number of men subsequently to the forfeiture would redeem a title forfeited by a previous noncompliance with the by-laws (*d*).

Mining on private land.

The law of mining on private land, which was built upon numerous decisions extending over a number of years, was completely swept aside by the passing of *The Mining on Private Property Act 1884* (*e*). Previous to the passing of this enactment, as it had been established that all gold mines were the property of the Crown, there was no legal means available of mining on land alienated from the Crown, though such mining was carried on to a large extent by means of a lease or licence to mine granted for what it was worth by the freeholder to the miner, who was permitted to remove and appropriate the gold with the tacit consent of the Crown.

The Mining on Private Property Act 1884.

Under *The Mining on Private Property Act 1884*, however, the Crown asserted its right to royal mines, and the tacit consent therefore given took visible form in the shape of a mining lease from the Crown, authorising mining for gold (*f*) on private land, subject to the payment of compensation to the owner and occupier of the freehold for damage to the surface, which compensation might be arrived at by agreement between the owner and the miner, or in case of non-agreement by decision of the Warden or the Court of Mines. This Act was consolidated in the Act No. 1120, and has been repealed by the *Mines Act 1897* (*g*), Part II of which is thereby substituted for the former Act (*h*).

The existing code.

The consolidating statute known as the *Mines Act 1890* (*i*) embodied all the mining Acts in force on August 1, 1890, including several Acts relating to residence areas,

(*d*) *Hunter v. M^cNulty*, 13 V.L.R. 416; 9 A.L.T. 33 (1887).

(*e*) 48 Vic. No. 796.

(*f*) The Act applied only to gold and silver mines.

(*g*) 61 Vic. No. 1514.

(*h*) See *post* Bk. II, Ch. IV, "GOLD MINING ON PRIVATE LAND."

(*i*) 54 Vic. No. 1120. This Act will be referred to throughout this work as "No. 1120."

regulation and inspection of mines, drainage of mines, and the provisions of *The Mining Accident Relief Fund 1884* (*j*). The Act No. 1120 was from time to time amended by various small measures, all of which have been repealed by the *Mines Act 1897* (*k*); and the *Mines Acts* of 1890 and 1897, together with the regulations made under them, and the by-laws in force in the several mining districts, comprise the existing mining code of Victoria. Introductory.

The statute law of the other States of Australia affecting mining on Crown lands is to a great extent uniform with that of Victoria. The *Mining Statute 1865* (*l*) is the foundation upon which all the various Acts are based, and though the wording and phrasing of the latter are in many respects different, yet the same uniform principle underlies the whole. Indeed, in the Mining Acts of the several States, notably in those of New South Wales, Queensland, and Western Australia, the wording of some sections has not been altered in any degree, the sections of No. 291 having been re-enacted in their entirety. Where this has not been done the fundamental principles of No. 291 have been recognised in the Acts of the other States, both as regards mining management and mining administration. In each State is established an inferior mining court similar to the tribunal of the Warden, and also an appellate court, though, with the exception of New South Wales, there is no court of original jurisdiction answering to the Victorian Court of Mines; but in all the States there is a right of appeal from the decision of the Warden, whether it be to the District Court or the Supreme Court. The effect of this uniformity is shown in the mining law as laid down by decided cases, and the great majority of the judgments of the Victorian Courts are applicable equally to all the States. Acts of the other States.

As regards mining on private land, with the exception of the State of Western Australia, which has practically adopted Mining on private land in other States.

(*j*) 48 Vic. No. 826.

1514."

(*k*) 61 Vic. No. 1514, referred to throughout this work as "No.

(*l*) 29 Vic. No. 291.

Introductory. in its entirety Part II of the Act No. 1514 of Victoria (*m*), a lack of uniformity exists in the Acts of the several States; they are not framed on one common basis, and no two are alike. This is no doubt attributable to the novel character of this peculiar class of legislation, and of the rights and privileges of the parties affected, and all these enactments may be regarded as experimental.

Appendix. In order to facilitate a comparison of the laws of the different States, the *Mines Acts* of Victoria are set out in the Appendix, *post*, together with a note at the end of each applicable section referring to the corresponding or analogous section in the Acts of the other States.

(*m*) 62 Vic. No. 29 (W.A.)

BOOK I.
INTERESTS IN GOLD MINING
CLAIMS.

CHAPTER I.

THE MINER'S RIGHT.

SEC. I.—PRIVILEGES CONFERRED BY THE MINER'S RIGHT.	SEC. IV.—AS A CONDITION PRECEDENT TO SUE.
SEC. II.—WHO MAY HOLD A MINER'S RIGHT.	SEC. V.—HELD BY INCORPORATED COMPANIES.
SEC. III.—TITLE UNDER MINER'S RIGHT.	SEC. VI.—CONSOLIDATED MINER'S RIGHT.

SECTION I.—PRIVILEGES CONFERRED BY THE
MINER'S RIGHT.

The document known as a miner's right was introduced to take the place of the licence to mine for gold formerly issued by the Crown, and is usually limited to remain in force for one year from the date of issue (a). It now

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Sec. I.*

The miner's
right.

(a) The term for which a miner's right may be in force is any number of years not exceeding fifteen; Act No. 1120, sec. 4.

*Bk. I. Ch. I.
Sec. I.*

authorizes the holder to mine for any mineral (*b*), and may operate from a future day named in it (*c*); and in case of loss of a miner's right a duplicate may be issued (*d*).

Privileges
conferred by
miner's right.

The miner's right was first substituted for the licence to mine by the Goldfields Act passed in July, 1855 (*e*), which granted certain privileges to the holders of miners' rights, and these privileges were subsequently extended by *The Goldfields Act* (*f*), and were still further enlarged by *The Mining Statute* 1865 (*g*), in section 5 of which Act the privileges conferred by a miner's right are fully set out (No. 1120, sec. 5). This Act, besides giving the holder of a miner's right power (except as against the Queen) to take possession for mining purposes of so much Crown land as the by-laws permit, confers numerous other ancillary privileges and powers which are conferred by no other single document issued by the Crown. The privilege given by the section to cut live and dead timber for mining purposes did not extend to the cutting of timber on land proclaimed as a timber reserve (*h*), but authority for doing so is now given by the Act No. 1514, sec. 9. The making of a race is a mining purpose within the Act. "In Victoria, where the subject has often been considered, it has always been held that the making of a race is a mining purpose within the meaning of the Acts from which all our (New Zealand) mining Acts are more or less borrowed" (*i*). The reservation "except as against the Queen" does not reserve to the Crown any royalty on the gold obtained from a claim held under miner's right, but only means that during the continuance of the miner's right the Crown may revoke the title by exempting the land from occupation under miner's right (*j*), and except for this reservation the title acquired under a miner's right is good against the world. A miner's

(*b*) Act No. 1514, sec. 6.

(*c*) *Ibid*, sec. 7.

(*d*) *Ibid*, sec. 13.

(*e*) 18 Vic. No. 37.

(*f*) 21 Vic. No. 32; referred to throughout this work as Act No. 32.

(*g*) 29 Vic. No. 291; referred to

as Act No. 291.

(*h*) *La Gerche v. Ah Hann*, 7 A.L.T. 70 (1885).

(*i*) *Per Chapman, J. in Robinson v. Blundell*, Mac. (N.Z.) 683 (1868).

(*j*) *Lennox v. Golden Fleece & Heales Co.*, 5 A.J.R. 18 (1874).

right may be regarded as a grant of easement for the parcel of Crown land held under it during its currency (*k*), but only subject to its being renewed on its expiration, for if a claimholder ceases to hold a miner's right the fact of his allowing it to lapse may be taken as corroborative evidence of an intention to abandon the claim or property held under it (*l*); the title to a residence area does not necessarily determine on lapse of the miner's right, but becomes voidable only during the period the miner has no miner's right (*m*).

*Bk. I. Ch. I.
Sec. I.*

The authority for the issue of miners' rights in a somewhat similar form and with similar privileges is granted by the Mining Acts of all the States (*n*). Other States.

Thus, though the interest of a claimholder in his claim under a miner's right is as against the Crown at the utmost an estate at will (*o*), the occupation under it being legal only during the currency of the miner's right, yet such occupation is paramount to every other title, except as against the Queen (*p*), and may be considered, except as against the Queen, in the nature of a permanent estate. Estate under
miner's right.

A miner's right is a document showing that the holder is entitled to enter upon land and to take possession of such portions of land under certain conditions as he thinks contain minerals. It is not a deed showing that he is the owner of the land, but merely a document showing that he has a right to avail himself of mining lands; it puts him in a position to select land for mining purposes (*q*). The interest in land occupied is a chattel interest (No. 1120, sec. Is an easement.

(*k*) *Cawley v. Ling*, 6 W.W. & A.B. (M.) 12 (1869).

(*l*) *Niemann v. Weller*, 3 W.W. & A.B. (E.) 125 (1866); and see *Vial v. Allender* (F.C.) 23 V.L.R. 516; 19 A.L.T. 161; 4 A.L.R. 17 (1898).

(*m*) *Vial v. Allender*, *supra*, overruling *Abraham v. Della Ca* (1), 23 V.L.R. 338; 3 A.L.R. 260; 19 A.L.T. 92 (1897); *Truswell v. Woods*, 20 A.L.T. 210; 5 A.L.R. 62 (1899).

(*n*) Compare 37 Vic. No. 13

(N.S.W.), sec. 14; 57 Vic. No. 24 (Tas.), sec. 23; 39 Vic. No. 40 (W.A.), sec. 14; 56 & 57 Vic. No. 587 (S.A.), sec. 27; 62 Vic. No. 24 (Q.), sec. 11; 62 Vic. No. 38 (N.Z.), sec. 64.

(*o*) *Jennings v. Kinsella*, 1 W.W. & A.B. (L.) 47 (1864).

(*p*) *Hookway v. Muirhead*, 1 W. & W. (L.) 107 (1861).

(*q*) *Bourke v. Wright*, 3 N.S.W. L.R. (L.) 145 (1882).

Bk. I. Ch. I. Sec. I. 5). It is not an estate in the land itself, but a right to reap some benefit from the land. It is that sort of right which is properly called an easement; an incorporeal right capable of transmission (*r*). A miner's right does not confer a title of right against the Crown itself, because the holder is only entitled "except as against the Queen" (*s*). In South Australia it only operates in respect of land in a district which has been proclaimed a goldfield (*t*); so, in the other States (*u*). In New South Wales it was held that the holder of a miner's right could mine on any Crown land, whether a goldfield or not (*v*).

Multiplied
miners' rights.

A miner's right may be granted to any person applying for the same on payment of a sum of 2s. 6d. for every year for which it is to be in force (*w*), and though not directly so stated in the *Mines Acts* the intention of the Acts is that a person cannot hold more than one miner's right in his own name, on the assumption that the cause of justice will not struggle against the fiscal policy of the law (*x*). In South Australia Her Majesty through her Wardens had absolute discretion as to the issue of miners' rights under *The Goldfields Act* of 1885 (*y*). Neither under the Act No. 1120 is one person enabled to multiply himself or his powers by multiplying his miners' rights, or obtaining a number of miners' rights in his own name (*z*). The duplication of miners' rights is authorized by *The Mining Act* 1898 of New Zealand (*a*); and in South Australia, though only one claim can be held under one miners' right (*b*); whilst in Tasmania no person may hold more than one miner's

(*r*) *Robinson v. Blundell*, Mac. (N.Z.) 683 (1867).

(*s*) *Reg. v. Gee, ex parte Wendt*, 23 S.A.L.R. 164 (1889); see Act No. 1120, sec. 5.

(*t*) 56 & 57 Vic. No. 587 (S.A.), sec. 7.

(*u*) 37 Vic. No. 13 (N.S.W.), sec. 10; 57 Vic. No. 24 (Tas.), sec. 17; 59 Vic. No. 40 (W.A.), sec. 7; 62 Vic. No. 24 (Q.), sec. 7; 62 Vic. No. 38 (N.Z.), sec. 10.

(*v*) *Ex parte Ah Tchih*, 3 N.S.W. S.C.R. (L.) 226 (1864); but see now Act 37 Vic. No. 13 (N.S.W.), sec.

15.

(*w*) Act No. 1120 sec. 4; Act No. 1514, sec. 8.

(*x*) *Lennox v. Golden Fleece and Heales Co.*, 5 A.J.R. 18 (1874).

(*y*) *Reg. v. Gee, ex parte Wendt*, *supra*; see 56 & 57 Vic. No. 587 (S.A.), sec. 27.

(*z*) *Cawley v. Ling*, 6 W.W. & A'B. (M.) 12 (1869); *Milne v. Morell*, 3 V.R. (M.) 4; 3 A.J.R. 21 (1872).

(*a*) 62 Vic. No. 38 (N.Z.), sec. 62 (3).

(*b*) 56 & 57 Vic. No. 587 (S.A.), sec. 38.

right (c). But notwithstanding the intention of the Act No. 1120, the mining board by-laws in Victoria may lawfully permit the holder of one miner's right to take up and hold a stated number of men's ground under it (d); though it is doubtful whether a by-law enacting that multiplied quantities of ground might be taken up by one man multiplying his miners' rights would not be *ultra vires* (e).

*Bk. I. Ch. I.
Sec. I.*

The usual number of men's ground permitted by the various by-laws to be taken up and held under one miner's right is fifty, though of course on application for the ground and registration of the claim under the by-laws a separate fee is payable for each man's ground taken up, the limit as to dimensions and boundaries of the claim being fixed by the by-laws (f).

Limits of claims.

A miner's right authorizes the holder of it to take for mining purposes only such Crown land as is not legally in the occupation of another, and he has no right to enter or search for gold on ground held by another person under miner's right or mining lease (g), nor during the pendency of an application for lease (h), or of an application for renewal of a lease (i); nor has he any authority under his miner's right to enter on land alienated from the Crown (j), save under the provisions of Part II of the *Mines Act 1897*; neither has he a right to mine on or under a public road without the permission of the local municipality or body having the care and management of it (k). The term "mining" includes obtaining and taking away and consequently appropriating the gold (l).

What is not authorized by miner's right.

A holder of a miner's right can, however, take up a claim

Claim taken by trustee.

(c) 57 Vic. No. 24 (Tas.), sec. 27.

(d) *Crocker v. Wigg*, 5 W.W. & A'B. (M.) 20 (1868).

(e) *Cawley v. Ling*, *supra*.

(f) Act No. 1120, sec. 106 (iii).

(g) *Harwood v. Coster*, 2 W.W. & A'B. (L.) 163 (1865).

(h) Act No. 1120, sec. 70.

(i) Act No. 1514, sec. 49.

(j) *Reg. v. Davies* (1), 6 W.W. & A'B. (L.) 246; N.C. 7, 16, 64 (1869). See *post*, Bk. II, Chap. IV, "GOLD

MINING ON PRIVATE LAND."

(k) *House v. Ah Sue*, 2 W. & W. (L.) 41 (1863); compare Act No. 1120, sec. 19, with Act No. 32, sec. 4, under which this case was decided; and see *Meredith v. Bunn*, Sup. Ct. Vic. April 4, 1860; *Argus*, April 5, 1860. See *post*, Chap. II, Sec. VII, (a) "Public Highways."

(l) *Reg. v. Wilson*, 12 N.S.W. S.C.R. (L.) 258 (1874).

Dk. I. Ch. I.
Sec. I.

as trustee for another person not holding one, and can thereby confer an equitable interest in the claim upon the *cestui que trust* (*m*).

Title to gold.

The miner's right is the authority or title by virtue of which a claim is acquired as against the rest of the public, and possession under it in conformity with the by-laws gives the holder of the miner's right a title not only to the claim but to all gold in and upon that claim (*n*), and that whether the gold be in the quartz or in the soil generally (*o*). Under a tribute agreement by which the tributers were to receive a percentage of the gold it was held that the title to the gold remained in the mine owner, and did not pass to the tributers (*p*).

Other privileges.

Many other privileges, such as the right of residence, voting at elections for members of the mining board, constructing races, dams and reservoirs, diverting water, erecting buildings, cutting fuel &c., are conferred by this important document; privileges which will be considered in the subsequent chapters.

Powers under miner's right.

Thus a miner's right may be said to be more extensive in the grant of powers and privileges under it than a grant of freehold land, or what is ordinarily known as a Crown grant, and upon no other condition than the payment to the Crown of a small fee annually, and the renewal from time to time of the miner's right.

SECTION II.—WHO MAY HOLD A MINER'S RIGHT.

Who may obtain a miner's right.

The *Mines Act* 1890 enacts that a miner's right shall be granted to any person applying for the same on payment of the proper fee, and shall contain the Christian name and surname and the residence of the person to whom it is

(*m*) *Volunteer Extended Co. v. Grand Junction Co.*, 4 W.W. & A'B. (M.) 6 (1867).

(*n*) *McGill v. Tatham*, 2 W.W. & A'B. (L.) 52 (1864).

(*o*) *Scottish & Cornish G.M. Co. v. Great Gulf G.M. Co.*, 2 W.W. & A'B. (L.) 103 (1865).

(*p*) *Reg. v. Hawkins*, 2 N.Z. C.A. 367 (1874).

issued (*a*); and there appears to be no exemption from the privilege. The address "of Melbourne" as descriptive of residence is sufficient (*b*); and it is not necessary that a miner's right should bear the full name of the holder; it is only a question of proof of identity between the person named in the right and the claimant of the right (*c*).

*Bk. I. Ch. I.
Sec. II.*

A married woman may hold a miner's right, and may claim title under it, though it appears she cannot maintain a suit for forfeiture before the Warden as a *feme sole* (*d*). Married woman.

As before stated, separate miners' rights are not required for both a trustee and his *cestui que trust*, it being sufficient for all purposes if the trustee is the holder of a miner's right (*e*); and a *cestui que trust* having no miner's right may sue his trustee who holds one in the Court of Mines for recovery of a share in a claim (*f*). Trustee.

The same principle may be applied to the case of a vendor and his purchaser (*g*); and to a mortgagor of mining shares seeking redemption (*h*). Vendor and purchaser.

An incorporated company may be the holder of a miner's right (*i*), and such company is entitled to a miner's right in its corporate name (*j*); it is not necessary for each individual shareholder in the company to have one (*k*); or a consolidated miner's right (*l*) in the name of the manager or other trustee of the company for the proper number of miners' rights is sufficient for all purposes (*m*). Companies.

(*a*) Act No. 1120, sec. 4.

(*b*) *Antony v. Dillon*, 15 V.L.R. 240; 10 A.L.T. 231 (1889).

(*c*) *Homeward Bound G.M. Co. v. McPherson*, 17 N.S.W.L.R. (E.) 281, 323 (1896).

(*d*) *Foley v. Norton*, 4 V.L.R. (M.) 13 (1878); see 54 Vic. No. 1116.

(*e*) *Volunteer Extended Co. v. Grand Junction Co.*, 4 W.W. & A'B. (M.) 6 (1867).

(*f*) *McDougall v. Webster*, 2 W.W. & A'B. (L.) 164 (1865); and see *Theodore v. Theodore*, 8 Q.L.J. 76, decided under the Act 38 Vic. No. 11 (Q.), sec. 69 (1897).

(*g*) *Learmonth v. Morris*, 6 W.W.

& A'B. (E.) 74 (1869).

(*h*) *Salmon v. Mulcahy*, 3 W.W. & A'B. (E.) 139 (1863), note (c).

(*i*) *Australasia Co. v. Wilson*, 4 A.J.R., 18, 63 (1873); *Volunteer Extended Co. v. Grand Junction Co.*, *supra*; *Albion Co. v. St. George United Co.*, 4 W.W. & A'B. (M.) 37 (1867).

(*j*) So in Tasmania; 57 Vic. No. 24 (Tas.), sec. 26; and in Western Australia; 59 Vic. No. 40 (W.A.), sec. 18.

(*k*) *In re Verdon, ex parte Albion Co.*, 1 W.W. & A'B. (L.) 207 (1864).

(*l*) Act No. 1120, sec. 4.

(*m*) *Albion Co. v. St. George United Co.*, *supra*.

Bk. I. Ch. I.
Sec. 11.
Sufficient
number.

But it is absolutely necessary that a company hold a sufficient number of miners' rights, or an equivalent consolidated miner's right, for the number of men's ground held in the company's claim, otherwise the title to the claim will be defective, and the rights of the company circumscribed (*n*), it being entirely foreign to the policy of the *Mines Acts* to permit a number of men's ground to be taken up and held under an insufficient number of miners' rights (*o*).

SECTION III.—TITLE UNDER MINER'S RIGHT.

Title based on
possession.

The title to a mining claim is based on possession. The occupier of a claim must be and continue the holder of a miner's right in force (*a*), and all that is required of him is that he shall hold and occupy his claim in conformity with the by-laws of the mining district or division in which the claim is situated (*b*).

Defective re-
gistration.

Even if the certificate of registration of the claim is not in the form required by the by-laws, occupation under a miner's right is not regarded as unauthorized occupation of Crown land, and a complaint for illegally occupying Crown lands is sufficiently answered by a defendant showing that he is in occupation under a miner's right, whether he be actually engaged in mining or not (*c*).

Occupation.

Provided a claim is taken up and held in conformity with the by-laws, occupation of it by virtue of a miner's right is paramount to every other right, except as against the Queen (*d*); and the title of a person in occupation of a

(*n*) *Bebro v. Bloomfield*, 5 V.L.R. (M.) 26; 1 A.L.T. 27 (1879); *Chisholm v. United Extended Band of Hope Co.*, 4 W.W. & A'B. (M.) 31 (1867); *Great North West Co. v. Mehmet*, 4 W.W. & A'B. (M.) 64 (1867).

(*o*) See *post* Sec. V, "MINERS' RIGHTS HELD BY INCORPORATED COMPANIES."

(*a*) As to lapse of miner's right, see *Vial v. Allender*, (F.C.) 23

V.L.R. 516; 19 A.L.T. 161; 4 A.L.R. 17 (1898).

(*b*) *McGill v. Tatham*, 2 W.W. & A'B. (L.) 52 (1864).

(*c*) *McLean v. Wearu*, 1 A.J.R. 152 (1870); *Wakeham v. Cobham*, 1 V.R. (M.) 34; 1 A.J.R. 93 (1870); *Reg. v. Dowling, ex parte McLean*, 2 A.J.R. 56; 2 V.R. (L.) 61 (1871).

(*d*) *Hookway v. Muirhead*, 1 W. & W. (L.) 107 (1861).

claim under a miner's right is not in any way affected by an application for a mining lease of the land occupied by him (e). But mere possession of a claim under a miner's right is not a reservation within the meaning of section 74 of the *Transfer of Land Act* 1890 (f), and such possession is no answer to an action of ejectment brought by the holder of a certificate of title for the same land (g).

*Bk. I. Ch. I.
Sec. III.*

Any question of title as between the holder of a miner's right and the registered proprietor under a Crown grant or certificate of title will be sufficient to oust the jurisdiction of the justices to hear a complaint (h).

Jurisdiction of
justices.

Within the four corners of Part I of the *Mines Act* 1890 a title cannot be made by one miner's right to more than one claim or one man's ground, unless otherwise provided by the by-laws (i); but a by-law can lawfully be made enabling the holder of one miner's right to take up several single men's ground or claims under it without requiring the duplication or multiplication of the miner's rights (j).

Duplication of
miner's right.

As a miner's right under section 5 of Act No. 1120 only gives *per se* the privilege of taking up and occupying parcels of Crown lands, it does not authorize mining for gold on private land; but Part II of the Act No. 1514 permits the holder of a miner's right issued under the former Act to enter upon and occupy private land. Under the Act No. 1120 payment is made for a miner's right to work Crown lands, and Crown lands only (k). Under certain conditions imposed by the *Mines Act* 1897 (l), miner's rights are now available for mining on any private land, though this does not include the privilege of residence, constructing

Private land.

(e) *Aladdin G.M. Co. v. Aladdin & Try Again G.M. Co.*, 6 W.W. & A'B. (E.) 266 (1869); and see Act No. 1120, sec. 65.

(f) 54 Vic. No. 1149.

(g) *Munro v. Sutherland* (1), 4 A.J.R. 166 (1873).

(h) *Reg v. Webster*, 1 V.R. (L.) 82; 1 A.J.R. 78 (1870); and see *Campion v. Turton*, 3 N.Z. L.R.S.C. 337 (1884) as to interpleader;

Haughton v. Hockings, 24 V.L.R. 907; 5 A.L.R. 107 (1899).

(i) *Cawley v. Ling*, 6 W.W. & A'B. (M.) 12 (1869); *Milne v. Morell*, 3 A.J.R. 21; 3 V.R. (M.) 4 (1872).

(j) *Crocker v. Wigg*, 5 W.W. & A'B. (M.) 20 (1868).

(k) *Reg v. Davies* (1), 6 W.W. & A'B. (L.) 246; N.C. 7, 16, 64 (1869).

(l) Act No. 1514, Part II.

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Sec. III.*

races, cutting timber, &c., on such land which is attached to it in respect of Crown lands.

Renewal of
miner's right.

A miner's right must be renewed (*i.e.* a fresh miner's right obtained in lieu of it) before the period for which it has been granted expires, and the dates of the document and of its expiration are required to appear on the face of the miner's right (*m*). It is a title for the claim held under it, but only during its currency, and becomes dead on the expiration of the term (*n*); and if a claimholder ceases to hold a miner's right, or fails or neglects from any cause to renew it, the title becomes voidable (*o*), and such neglect may be used in evidence of the abandonment of the claim held by virtue of the miner's right (*p*).

Termination of
title.

In a suit for possession of a claim the termination before the commencement of the suit of the miner's right under which the defendant previously held the claim, the miner's right not having been renewed, was held to terminate the defendant's title to the claim as against the complainant (*q*). "Claims to mine on Crown lands," says Molesworth, Chief Judge, "are dependent for their continuance or means of legal enforcement upon the renewal of miner's rights, but still are in the nature of permanent estates, and are not confirmed by that which is a means of renewal" (*r*). But some doubt was expressed whether a title under a miner's right which is liable to forfeiture for omission to renew the right is restored by a miner's right being taken out before adverse proceedings; if the doctrine is pushed to the extremity that the title is lost on the omission to keep up a continuous miner's right, a day's delay or omission would be fatal to the title (*s*). It is now decided by the Full Court that if the miner's right be renewed before a suit for

(*m*) Act No. 1120, sec. 4; it may be ante-dated, *ibid*, sec. 14; or may operate from a future date; Act No. 1514, sec. 7 (1).

(*n*) *Cawley v. Ling*, 6 W.W. & A'B. (M.) 12 (1869).

(*o*) *Vial v. Allender*, 23 V.L.R. 516; 19 A.L.T. 161; 4 A.L.R. 17 (1898).

(*p*) *Niemann v. Weller*, 3 W.W. & A'B. (E.) 125 (1866).

(*q*) *Lennox v. Golden Fleece & Heales Co.*, 5 A.J.R. 18 (1874).

(*r*) *Clerk v. Wrigley*, 4 W.W. & A'B. (M.) 74 (1867).

(*s*) *Summers v. Cooper* (1), 5 V.L.R. (M.) 22; 1 A.L.T. 46 (1879).

possession is commenced the title will not of necessity be determined (*t*).

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In taking up ground under a miner's right the miner's right need not at the time of its issue be appropriated to any specific ground; and the holder of ground (*u*) under a miner's right which had expired was allowed to appropriate to the same ground another miner's right which he held, and which he had not appropriated before, in order to save a forfeiture, although he might not have intended so to appropriate it when the miner's right was taken out (*v*).

Appropriation
of miner's right.

Though a person not being the holder of a miner's right is not authorized to take up and become possessed of a claim, yet he may give a power of attorney to another person to take up ground in anticipation of having one (*w*).

Under power of
attorney.

Although as against the Crown the interest of a claimholder in his claim may be regarded as an estate at will (*x*), yet the holder of a claim under a miner's right is for all mining purposes possessed of his claim for a permanent estate as against the public, determinable only by voluntary abandonment *de facto*, or by those breaches of conditions which amount to a constructive abandonment or forfeiture (*y*).

Estate under
miner's right.

SECTION IV.—AS A CONDITION PRECEDENT TO SUE.

The possession of a miner's right in force is a condition precedent to the right of any person to institute proceedings in any Court or before the Warden to recover possession of land occupied by virtue of a miner's right, or of any share in such land, or to recover any damages for or to restrain the occupation of or encroachment upon such land, or any part thereof, or to obtain relief as tenant in common, joint

No. 1120 sec. 298.

(*t*) *Vial v. Allender, supra.*

(*u*) Ballarat By-laws, No. XI.

(*v*) *Fattorini v. Band & Albion Consols* (2), 9 V.L.R. (M.) 1; 4 A.L.T. 121 (1883).

(*w*) *Keast v. D'Angri*, 4 A.J.R. 61 (1873).

(*x*) *Jennings v. Kinsella*, 1 W.W. & A'B. (L.) 47 (1864); *Lennox v. Golden Fleece & Heales Co.*, 5 A.J.R. 18 (1874).

(*y*) *Mulcahy v. Walhalla Co.*, 5 W.W. & A'B. (E.) 103 (1867).

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Sec. IV.*

tenant, co-partner or co-adventurer in any such land against his tenant in common, joint tenant, co-partner or co-adventurer; and it is necessary that such person shall have been the holder of a miner's right, or included in a consolidated miner's right, at the time when his alleged title to recover such possession or damages, or to obtain such relief, first arose or accrued (*a*). So, in the other States (*b*), and in New Zealand (*c*). A person holding a mining lease in New South Wales has a right to claim the jurisdiction of the Warden's Court just as much as if he held a miner's right (*d*).

Condition to
obtaining relief.

A miner's right is not a part of the plaintiff's title as against the defendant so much as a condition as to his capacity to obtain relief (*e*); and therefore it is not necessary that a person seeking to enforce forfeiture of a claim should have a miner's right at the time the forfeiture was incurred; it is sufficient if he has one when the complaint is made (*f*). And where under the Act No. 32 a plaintiff in equity held a miner's right at the time when his title to relief first arose, and also at the time of filing his bill, but had during a portion of the interval been without one, it was held that this was a sufficient compliance with section 90 of that Act, which is in all respects identical with section 298 of the Act No. 1120 (*g*).

When not neces-
sary.

Certiorari.

An applicant for *certiorari* to bring up a Warden's order ousting him from a claim need not hold a miner's right, as it is not an application by him to be put in possession of a claim (*h*), though the want of a miner's right would prevent him acquiring the claim; and a mortgagor seeking redemption of mining shares is not liable to the necessity of holding

Mortgagor seek-
ing redemption.

(*a*) Act No. 1120, sec. 298.

(*b*) 37 Vic. No. 13 (N.S.W.), sec. 19; 62 Vic. No. 24 (Q.), sec. 160; 56 & 57 Vic. No. 587 (S.A.), sec. 20 (vii); 59 Vic. No. 40 (W.A.), sec. 17.

(*c*) Regulations under *The Mining Act* 1898 (N.Z.), June 18, 1900, No. 5.

(*d*) *Ex parte Pye*, 18 N.S.W.L.R. (L.) 272 (1897), explaining *Duncan v. Fullerton*, 14 N.S.W.L.R. (L.)

308; 10 W.N. 33 (1893).

(*e*) *Lee v. Robertson*, 1 W. & W. (E.) 374 (1863).

(*f*) *Olerk v. Wrigley*, 4 W.W. & A'B. (M.) 74 (1867); see *United Extended Band of Hope Co. v. Doyle*, 5 W.W. & A'B. (M.) 39 (1868).

(*g*) *Niemann v. Weller*, 3 W.W. & A'B. (E.) 125 (1866).

(*h*) *Reg. v. Heron, ex parte Bryer*, 2 V.R. (L.) 155; 2 A.J.R. 110 (1871).

a miner's right (*i*); nor is a purchaser seeking specific performance of a contract for sale of a mining claim (*j*); though possession of a miner's right in force is necessary in a suit in respect of a partnership at the time the plaintiff's title to relief first accrued (*k*). But under the Act No. 32 it was held that a *cestui que trust* who had no miner's right could sue his trustee, who had one, in the Court of Mines for recovery of a share in a claim (*l*). Neither need an assignee in insolvency hold a miner's right to enable him to sue (*m*); neither was the public trustee required to hold a miner's right in order to entitle him to sue under the Act 30 Vic. No. 32 (N.Z.) (*n*).

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Sec. IV.*

Specific performance.

Cestui que trust.

Assignee in insolvency.

In case a claimholder allows his miner's right to expire and fails to renew it his title to his claim is, as before stated, thereby made voidable, and in a suit where possession of a claim is sought on the ground that the defendant had no miner's right in force, the onus will be on the defendant to show that he had one in force at the commencement of the suit (*o*).

Lapse of miner's right.

A person contracting to purchase a mining lease was held entitled to bring a suit for specific performance of the contract provided he acquired a miner's right before the defendant refused to carry out the contract; and *semble*, it was unnecessary in a suit by a purchaser of a mine to enforce his rights against a vendor that the purchaser should have a miner's right at all (*p*).

Purchase of lease.

The miner's right on which a plaintiff relies as a condition precedent to sue must be produced at the hearing. The

Proof of miner's right.

(*i*) *Salmon v. Mulcahy*, 3 W.W. & A'B. (E.) 139, note (c) (1863); *Niemann v. Weller*, *supra*.

(*j*) *Learmonth v. Morris*, 6 W.W. & A'B. (E.) 74 (1869).

(*k*) *Jones v. Abraham*, 2 W. & W. (L.) 158 (1863); *Mackeprang v. Watson*, 2 W.W. & A'B. (L.) 106 (1865).

(*l*) *McDougall v. Webster*, 2 W. W. & A'B. (L.) 164 (1865).

(*m*) *Goodman v. Kelly*, 1 W. & W. (L.) 332 (1862).

(*n*) *Woodward v. Earle*, 2 N.Z. J.R. 12 (1874).

(*o*) *Lennox v. Golden Fleece and Heales Co.*, 5 A.J.R. 18 (1874); and see *Vial v. Allender*, *supra*.

(*p*) *Barclay v. Neeld*, 11 W.N. (N.S.W.) 9 (1894); *Mackeprang v. Watson* (*supra*), *Learmonth v. Morris* (*supra*), considered; see 37 Vic. No. 13 (N.S.W.), sec. 33; the applicant for a lease must hold a miner's right in that State.

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Sec. V.

books of the mining registrar are not evidence for the collateral purpose of showing that a person taking up a claim had a miner's right at the time of the injury complained of, so as to enable him to recover; though such books might be evidence to show the existence of a miner's right in such person as his qualification for taking up the claim (*q*).

SECTION V.—HELD BY INCORPORATED COMPANIES.

Must be
sufficient.

An incorporated company may hold a miner's right (*a*); but where a company never had a miner's right, but obtained a consolidated miner's right as for two men's ground only in the name of its manager, it was held that the company holding more than two men's ground had not a sufficient miner's right to enable it to sue (*b*).

In corporate
name.

A mining company was held entitled to obtain a miner's right in its corporate name, and it was not necessary for each individual shareholder to have one (*c*); and *vice versa* it was held sufficient if each member of an incorporated company held a miner's right, though the company had not one in its corporate name (*d*). A company registered in Victoria can acquire a miner's right to mine for gold in New South Wales, and (following *In re Verdon, ex parte Albion Co.* (*e*)) it is only necessary that a corporation should possess one miner's right, and it is not necessary for each member of the corporation to hold one (*e*). But in an application by a company and its manager for an injunction, the production of a miner's right in the name of the manager only as

Members of
company.

(*q*) *Cruise v. Crowley*, 5 W.W. & A'B. (M.) 27 (1868).

(*a*) *Volunteer Extended Co. v. Grand Junction Co.*, 4 W.W. & A'B. (M.) 6 (1867); *Australasia Co. v. Wilson*, 4 A.J.R. 18, 63 (1873).

(*b*) *Great North West Co. v. Mehennet*, 4 W.W. & A.B. (M.) 62 (1867); *Chisholm v. United Extended Band of Hope Co.*, 4 W.W. & A'B. (M.) 31 (1867).

(*c*) *In re Verdon, ex parte Albion*

Co., 1 W.W. & A'B. (L.) 207 (1864).

(*d*) *Smith v. Scottish & Cornish Co.*, 2 W.W. & A'B. (L.) 121 (1865); and see *Band of Hope & Albion Consols v. St. George & Band of Hope United Co.*, 1 V.R. (E.) 183; 1 A.J.R. 174; on appeal 2 A.J.R. 127 (1870).

(*e*) *Homeward Bound G.M. Co. v. McPherson*, 17 N.S.W. L.R. (E.) 281, 323 (1896).

trustee for the company is not sufficient to entitle them to relief; and the manager cannot in such a case apply in his own name for an injunction (*f*).

*Blk. I. Ch. I.
Sec. V.*

A mining company can, however, sue for trespass if holding a miner's right at the time of the trespass in respect of which relief is sought, though it may not have had one at the time the trespass actually commenced (*g*). But where a company sued in the Court of Mines to set aside the sale of a claim and machinery by the bailiff of the Court under a warrant of execution on the ground of irregularity, and miners' rights to the trustees of the company were produced, but no miner's right to the company, it was held on appeal that the company could not support its suit as to the claim, as it did not hold a miner's right (*h*).

When relief sought.

SECTION VI.—CONSOLIDATED MINERS' RIGHTS.

A consolidated miner's right may be in force for any number of years not exceeding fifteen, and may be obtained on the application of the manager or any trustee or trustees of any company or persons who shall have agreed to work in partnership any registered claim or claims; and when granted is in lieu of and represents and is of the same force and effect as a number of miners' rights granted for the same period of time equal to the number of miners' rights by virtue of which such claim or claims shall have been originally taken possession of (*a*).

By whom obtainable.

A registered company may hold a consolidated miner's right either in its corporate name or in the name of its manager (*b*); but a consolidated miner's right being for a

Registered companies.

(*f*) *Grant v. Lawlor*, 3 V.L.R. (M.) 15 (1877).

(*g*) *Sea Queen Co. v. Sea Quartz Co.*, 4 A.J.R. 130, 174, (1873); and see *Clerk v. Wrigley*, 4 W.W. & A'B. (M.) 74 (1867).

(*h*) *Volunteer Extended Co. v. Grand Junction Co.*, 4 W.W. & A'B. (M.) 6 (1867).

(*a*) Act No. 1120, sec. 4; see also 59 Vic. No. 40 (W.A.), sec. 15; 62 Vic. No. 24 (Q.), sec. 13; 57 Vic. No. 24 (Tas.), sec. 24; 62 Vic. No. 38 (N.Z.), sec. 65.

(*b*) *Albion Co. v. St. George United Co.*, 4 W.W. & A'B. (M.) 37 (1867).

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Sec. VI.*

corporation holding no land except by trustees is not a consolidated miner's right within the meaning of the Act (c); and a manager holding a miner's right in his own name as trustee for a company which has no miner's right or consolidated miner's right cannot apply for an injunction in his own name (d); and a consolidated miner's right held by a manager as trustee for a company applies only to companies having been or seeking to be registered for a particular claim; it cannot be applied generally (e).

Must be
sufficient.

It is also necessary that a company have a sufficient number of miners' rights, or a consolidated miner's right, for the number of men's ground held in its claim, or its right to sue will be barred, and the title to the ground held, or at any rate a portion of it, will be jeopardized (f).

Assignment of
claim.

Where the registered holders of a claim holding miners' rights formed themselves into a company, but no miners' rights or consolidated miner's right were obtained by the company, it was held under by-laws (g) which stated that no person was to be considered in legal possession of a claim until registered, that as there had been no registered transfer of the claim from the claimholders to the company, the claimholders who remained on the register were still in legal occupation, and were entitled to sue alone for trespass, and that the company not holding miners' rights or a consolidated miner's right could not be joined, but that plaintiff could amend by striking out the company as co-plaintiff (h).

Original miners'
rights do not
lapse.

A number of persons holding separate miners' rights and obtaining a consolidated miner's right in respect of them do

(c) *Chisholm v. United Extended Band of Hope Co.*, 4 W.W. & A'B. (M.) 31 (1867).

(d) *Grant v. Lawlor*, 3 V.L.R. (M.) 15 (1877).

(e) *Chisholm v. United Extended Band of Hope Co.*, *supra*.

(f) *Bebro v. Bloomfield*, 5 V.L.R. (M.) 26; 1 A.L.T. 47 (1879); see also *Critchley v. Graham* (1), 2 W. & W. (L.) 71 (1863); *Chisholm v. United*

Extended Band of Hope Co., *supra*; *Sea Queen Co. v. Sea Quartz Co.*, 4 A.J.R. 130, 174 (1873); *Australasia Co. v. Wilson*, 4 A.J.R. 18, 63 (1873); *Great North West Co. v. Mehennet*, 4 W.W. & A'B. (M.) 62 (1867).

(g) Sandhurst By-Laws, No. VI, sec. 2.

(h) *Vallancourt v. O'Rorke* (1), 1 V.R. (M.) 43; 1 A.J.R. 158 (1870).

not surrender their original miners' rights, and such persons are deemed to be holders of miners' rights within the meaning of the *Mines Acts* during the continuance of the consolidated miner's right (*i*). The same law applies in Queensland (*j*), New Zealand (*k*), and Western Australia (*l*), though in the latter State a consolidated miner's right may not be issued to any Asiatic or African alien (*m*).

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Sec. VI.

A consolidated miner's right held on behalf of an incorporated company does not confer the privilege of residence; section 5 of the Act No. 1120 distinguishes between the privileges which mining companies should hold as incidental to their mining purposes, and the privileges of individuals holding miners' rights for residence and domestic uses in addition to the mining purposes (*n*).

Privilege of residence.

(*i*) Act No. 1120, secs. 4, 9.

(*j*) 62 Vic. No. 24 (Q.), sec. 13.

(*k*) 62 Vic. No. 38 (N.Z.), sec. 65.

(*l*) 59 Vic. No. 40 (W.A.), sec. 15.

(*m*) 62 Vic. No. 16 (W.A.), sec. 4.

(*n*) *Albion Co. v. St. George United Co.*, 4 W.W. & A'B. (M.) 37 (1867); *Warrior G.M. Co. v. Cotter*, 3 W.W. & A'B. (M.) 81 (1866).

CHAPTER II.

GOLD MINING CLAIMS ON CROWN LAND.

SEC. I.—WHAT IS A CLAIM.

SEC. II.—FRONTAGE AND BLOCK CLAIMS.

SEC. III.—MINING BOARD BY-LAWS.

SEC. IV.—OCCUPATION OF CLAIMS.

SEC. V.—TITLE TO CLAIMS.

SEC. VI.—AMALGAMATION OF CLAIMS.

SEC. VII.—LAND EXEMPTED FROM OCCUPATION AS A CLAIM.

(a) Reserves for Public Purposes.

(b) Public Highways.

SEC. VIII.—THE EFFECT OF MARKING OUT A CLAIM FOR A LEASE.

SEC. IX.—SUBSIDIARY CLAIMS.

SECTION I.—WHAT IS A CLAIM.

Bk. I. Ch. II.
Sec. I.
Definition of claim.

A MINING claim is defined as “a parcel of Crown land which any person in accordance with any by-laws of a mining board shall have taken possession of and be entitled to occupy for the purpose of seeking for gold therein, or any number of such parcels lawfully amalgamated by their owners,” but it does not include land comprised in any lease for gold-mining purposes (a); neither is a mining lease a claim within the meaning of section 108 of the *Crimes Act* 1890 (b). A claim may, however, include subsoil under

(a) Act No. 1120, sec. 3; and see *In re Clow, ex parte Hewitt*, 2 W. & W. (L.) 160 (1863).

(b) 54 Vic. No. 1079; *Reg. v. Davies* (2), 2 V.R. (E.) 117; 2 A.J.R. 74 (1871).

a road as well as under a residence area (c). The definition of a claim similar to the above is given in the Mining Acts of the other States and of New Zealand (d). Bk. I. Ch. II.
Sec. I.

Though the word "claim" was applied to ground held for mining purposes in the conditions of the old licences to mine, the first application of it in the mining code was in the Act 17 Vic. No. 4. When first
applied.

A claim, possession of which is sought before the Warden, need not necessarily comprise the whole of the ground held by the person sought to be dispossessed; a complainant may be put in possession of part only of the land held by the defendant. A claim is held (e) to mean what the land would be called as to the taker, though it might be part only of the claim or ground held by a previous occupant (f). Meaning of
"claim."

To constitute a place where mining operations are carried on a "mine" under the *Crimes Act* 1890 there must be a shaft, or something analogous to a shaft, but the distance from the shaft to the spot where operations are actually carried on is immaterial (g). This, however, refers to a "mine" which is a word of entirely different meaning from a "claim." The latter is the actual parcel of ground taken up, with a view to its subsequently becoming a mine where shafts are sunk and mining works are carried on. A claim, whether it be a frontage or a block claim, subsists over the entire surface of the ground (h), and even the proclamation under the *Police Offences Act* by the Governor-in-Council of a road through a claim, without any express act of the "Mine."

(c) *Sims v. Demamiel*, 21 V.L.R. 634; 17 A.L.T. 129, 241; 2 A.L.R. 51 (1896).

(d) 56 & 57 Vic. No. 587 (S.A.), sec. 4; 37 Vic. No. 13 (N.S.W.), sec. 2; 57 Vic. No. 24 (Tas.), sec. 4; 59 Vic. No. 40 (W.A.), sec. 4; 62 Vic. No. 24 (Q.), sec. 3; 62 Vic. No. 38 (N.Z.), sec. 5.

(e) Maryborough By-laws, Sept. 17, 1866, No. 84.

(f) *Barlow v. Hayes*, 4 W.W. &

A'B. (M.) 67 (1867).

(g) *Reg. v. Davies* (1), 6 W.W. & A'B. (L.) 246; N.C. 7, 16, 64 (1869). As to the meaning of "mine" under the *Police Offences Act* 1890 (54 Vic. No. 1126, sec. 41 (xi), see *Uren v. Rosewarne*, 15 A.L.T. 36 (1894).

(h) *St. George & Band of Hope Co. v. Band of Hope & Albion Consols*, 2 A.J.R. 81; 2 V.R. (E.) 206 (1871).

Bk. I. Ch. II. Sec. 1. Crown to put an end to the claimholder's rights will not over-ride the title of the claimholder (*i*).

Dealings.

An interest in a claim after registration may be divided into shares, or assigned, or encumbered (*j*); but a contract by an infant to sell and transfer his share in a claim could not be enforced (*k*). And where a plaintiff seeks specific performance of an executory contract for the sale and transfer of a mining interest, any delay in asserting his right will be fatal to his claim (*l*).

Taken in execution.

A claim may be seized under warrant of distress on execution in any New Zealand Court (*m*); and *semble*, where a claim has been taken in execution a magistrate has jurisdiction to entertain an interpleader summons, notwithstanding a question of title to land is involved (*n*). Under the Queensland Act 38 Vic. No. 11, sec. 67 (*o*), a bailiff selling land held under a miner's right in execution of a judgment had power to give immediate possession to the purchaser (*p*).

SECTION II.—FRONTAGE AND BLOCK CLAIMS.

Title to gold in claims.

There are only two kinds of claims known to the law, viz., frontage and block claims; and every holder of a block claim has equally with the holder of a frontage claim a right to all gold within the boundaries of that claim, whether the gold be in quartz or in the soil generally (*a*). There is no difference between quartz and alluvial block claims; a

(*i*) *Mayor &c. of Eaglehawk v. Waddington*, 5 W.W. & A'B. (M.) 6 (1868).

(*j*) Act No. 1120, sec. 8. Compare 37 Vic. No. 13 (N.S.W.), sec. 17; 56 & 57 Vic. No. 587 (S.A.), sec. 45; 62 Vic. No. 38 (N.Z.), sec. 139; 57 Vic. No. 24 (Tas.), sec. 28; Regs. under 59 Vic. No. 40 (W.A.), cl. 130; 62 Vic. No. 24 (Q.), sec. 16 (3).

(*k*) *Dillon v. Wood*, 2 N.S.W. L.R. (L.) 298 (1881). In Victoria a claim belonging to an infant must be registered by his guardian; Act No. 1120, sec. 7.

(*l*) *Butler v. Saddle Hill G.M. Co.*, 2 N.Z.L.R. (S.C.) 296 (1884).

(*m*) Under 41 Vic. No. 42 (N.Z.), sec. 96; see 62 Vic. No. 38 (N.Z.), secs. 265 (6), 269; as to warrants under Act No. 1120, see secs. 183, 242, 252.

(*n*) *Campion v. Turton*, 3 N.Z.L.R. (S.C.) 337 (1884).

(*o*) See 62 Vic. No. 24 (Q.), sec. 111.

(*p*) *Ex parte Kermode*, 7 Q.L.J. (N.C.) 91 (1876).

(*a*) *Tatham v. McGill*, 2 W.W. & A'B. (L.) 113 (1865).

holder of a block claim though registered only for a "block quartz claim" is unrestricted in his rights as holder of a block claim pure and simple (b). *Bk. I. Ch. II.*
Sec. II.

The system of marking off frontage claims came originally from Ballarat, and was for a time found to be very effective in developing new alluvial ground. The primary idea of the system was simple, and it answered a good purpose for a while as a means of prospecting and tracing new leads. The method of marking off frontage claims was defined by the regulations of the local court of the district of Ballarat (c), and was as follows:—A datum peg was fixed in a spot immediately over the known position of the lead, and from this datum peg radiating lines were laid out at such an angle as to include the probable course of the gutter or lead between them. The frontage claims, or length of gutter as allowed by the by-laws, were bounded by concentric parallel lines drawn from the central datum peg, and extended from one radiating line to the other. In other mining districts a plan was subsequently adopted of laying down a right line along the supposed course of the lead, and the longitudinal boundaries of the frontage claims were laid off at right angles to such right line, instead of by the concentric parallels. These lines or boundaries, called the frontage parallels embraced the claim, and the owner of it might sink shafts and search for gold anywhere within the parallels which formed his boundaries. As soon as the lead was discovered within the frontage claim the lateral boundaries (*i.e.* those formed by the radiating lines) were narrowed down to a size regulated by the by-laws, and the ground so narrowed, running its full length between the parallels, became a permanent claim, the balance of the frontage claim being abandoned (d). FRONTAGE
CLAIMS.

Method of
marking.

(b) *Scottish & Cornish G.M. Co. v. Great Gulf G.M. Co.*, 2 W.W. & A'B. (L.) 103 (1865).

(c) *Gov. Gazette*, March 7, 1856.

(d) See the judgment in *McCaferty v. Cummins*, 5 W.W. & A'B.

(L.) 73 (1868), as to frontage claims. The first by-law passed defining the mode of laying off frontage claims was made by the Ballarat Mining Board under the Act No. 32, on May 14, 1858.

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What is comprised in a frontage claim.

A frontage claim embraces the whole surface between the frontage parallels until it is narrowed down under the by-laws; and the claimholder is entitled not only to the gold upon the lead in respect of which the claim is registered, but to all gold within the parallels until so narrowed; and when narrowed, he is entitled to all gold at whatever depth within the claim as narrowed (*e*); and where a lead, after being worked through a frontage claim, passes into an adjoining frontage claim and then returns into the first claim, the holder of the first claim is entitled to work it between his parallels (*f*).

Title to frontage claim.

The holder of a frontage claim possesses a title to the whole ground marked off, which enables him to exclude from every portion of its area, either before or after it is narrowed, persons who take up a block claim within the parallels (*g*); and the prohibition to interference with a frontage claim on a lead undefined will not apply to frontage claimants on other leads intersecting, but their priority of title will depend on the question which lead the gold is upon (*h*); and moreover, registration of a frontage claim cannot be effected on the undefined leads within the boundaries of a frontage claim in which the course of the lead has not been ascertained (*i*).

Ground cannot be held under two titles.

A claimholder cannot hold one piece of ground under two distinct titles; he must take either a frontage claim or a block claim; the holder of a frontage claim taking up a block claim within his frontage area may forfeit his rights to that portion of his frontage area comprised in his block claim (*j*), though he does not necessarily forfeit his rights

(*e*) *St George & Band of Hope Co. v. Band of Hope & Albion Consols*, 2 V.R. (E.) 206; 2 A.J.R. 81, 127 (1871); *McGill v. Tatham*, 2 W.W. & A'B. (L.) 52 (1864).

(*f*) *United Working Miners G.M. Co. v. Prince of Wales Co.* (1), 5 W.W. & A'B. (M.) 50 (1868).

(*g*) *United Extended Band of Hope Co. v. Tenant*, 3 W.W. & A'B. (M.) 41 (1866); *United Sir William Don G.M. Co. v. Koh-i-noor Q.M. Co.*, 3 W.W. & A'B. (M.) 63

(1866); *McGill v. Tatham*, *supra*; *St George & Band of Hope Co. v. Band of Hope & Albion Consols*, *supra*.

(*h*) *United Working Miners G.M. Co. v. Albion Co.*, 4 W.W. & A'B. (M.) 1 (1867).

(*i*) *Smith v. Scottish & Cornish Co.*, 2 W.W. & A'B. (L.) 121 (1865), quoting *McGill v. Tatham*, *supra*.

(*j*) *United Extended Band of Hope Co. v. Tennant*, 3 W.W. & A'B. (M.) 41 (1866); *McGill v. Tatham*, *supra*;

to the remaining portion of his frontage claim; for where the holder of a frontage claim takes possession of a block claim within his frontage parallels, such possession affords evidence to be taken most strongly against him of abandonment of that part of his frontage claim included in such block claim (*k*); and where the holder of a block claim acquires from another person a frontage claim over a portion of the block claim, *semble* that the frontage title will merge in the block title in the same manner as if the holder of the block claim had held the frontage claim at the time of taking up the block claim (*l*).

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The frontage system was abolished at Ballarat by by-law No. III of the district mining board (*m*), it being found to have become very complex in its working in the cases of junction of leads, and leads returning within the parallels. It was shown, moreover, that the practical unjust working of the frontage system was inconsistent with the spirit of the by-laws, as it enabled persons having a previous claim over a single lead to engross all the gold in their area, working where they liked on the pretence of searching for the lead, stopping all others from working, and prolonging the period of uncertainty by delaying their works; and the abuses were remedied by the repeal of the frontage by-laws. The frontage system, however, still exists in other mining districts of Victoria in a modified form, and in all the districts in which frontage by-laws are in force the method has been adopted of marking off longitudinal lines at right angles to a base line in lieu of the concentric parallels. The complexity of the system at Ballarat gave rise to many almost interminable suits in the Supreme Court and in the Court of the Chief Judge, and though for the most part the elaborate judgments on the law of frontage claims are of comparatively little value now that the system is practically

The frontage
system.

Great North West Co. v. Sayers, 4 W.W. & A'B. (M.) 64 (1867); *Clerk v. Wrigley*, 4 W.W. & A'B. (M.) 74 (1867).

(*k*) *McCafferty v. Cummins*, 5

W.W. & A'B. (L.) 73 (1868).

(*l*) *United Working Miners G.M. Co. v. Prince of Wales Co.* (1), 5 W.W. & A'B. (M.) 50 (1868).

(*m*) *Gov. Gazette*, Aug. 17, 1866.

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obsolete, yet many of the points and questions decided by the courts in these cases are applicable to the mining law of the present day.

BLOCK CLAIMS. A block claim is a parcel of land that is marked out by defined metes and bounds, and taken up and registered in accordance with the by-laws as a defined block of land. Every claim other than a frontage claim is a block claim, irrespective of any explanatory name by which it may be called. The dimensions and form of a block claim are regulated by the by-laws, as well as the procedure to be adopted in marking out and registering the claim. Marking out a claim is universally done by fixing pegs or posts to mark the angles and boundaries of the claim, or along the approximate base line of a quartz reef; and where two corners of a claim are on a public street the claim may be effectually marked out by putting the pegs in the street, although the party fixing the pegs might be doing an unlawful act by encroaching on the highway (*n*).

Area of claim. In most of the by-laws the area of a claim, or one man's ground, in deep alluvial workings is regulated by the known or assumed depth of the lead. The depth or computed depth of the lead on which the by-laws base the quantity of land to be taken may, and in most cases must, be assumed at the time of registration, and the depth so assumed is conclusive (*o*); a claim cannot be enlarged or restricted on discovery of a mistake. In a suit for possession of land where the depth of lead is assumed, a variance between the plaint and the plan annexed to it is not fatal, but subjects the complainant only to getting a smaller quantity of land as shown by the plan, and does not invalidate the title altogether (*p*).

Working beyond boundaries. In some instances a claimholder is allowed to go beyond the limits of the area of his claim as marked on the surface.

(*n*) *Parade G.M. Co. v. Victoria United Co.*, 3 V.L.R. (E.) 24 (1877).
(*o*) See Ballarat By-laws, No. III, cl. 10, 11.
(*p*) *Milne v. Morell*, 3 V.R. (M.) 4; 3 A.J.R. 21 (1872).

Thus, where a local Court regulation (*q*) provided that the width of a claim should be one hundred feet on each side of the line of reef, and that the holders should be entitled to the dips and angles of all reefs within the boundary, and might follow them to whatever distance they might dip, it was held that the claimholders were entitled to hold spaces between the reef and a line running parallel to its actual course, and were also entitled to follow the dips and angles of the reef connected with it, though beyond the one hundred feet (*r*).

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Where a by-law (*s*) provided as to ordinary claims "as far as practicable all claims shall be marked off in a rectangular form," and as to special claims of a larger extent that any miners taking them up "must mark off the proposed claim in a rectangular form," it was held that ground which could not be marked out in a rectangular form could not be taken up as a special claim, but *semble*, that it might be taken up as an ordinary claim (*t*).

"Special
claims."

Under the Queensland *Goldfields Act* 1874 (*u*), reg. 44, reward claims were given for discovery of gold on a new reef at a certain distance from a known reef; and it was held that the ordinary rules as to taking possession did not apply to these claims (*v*). Under the *Mining Act* of South Australia (*w*) money rewards may be given to the discoverer of a new mineral district; so, now in Queensland, in lieu of reward claims (*x*). Under the Victorian law the Governor is empowered to grant special leases to discoverers of new goldfields (*y*).

Reward claims.

(*q*) Maldon Local Court Regulations, March 6, 1857.

(*r*) *Miller v. Fraser*, 4 W.W. & A'B. (M.) 29 (1867); *Vivian v. Dennis*, 3 W.W. & A'B. (M.) 29 (1866); and see *Thomas v. Kinnear* (2), 2 W. & W. (L.) 231 (1863); compare Act No. 1120, sec. 106 (iii), as to power of mining boards to make by-laws determining boundaries.

(*s*) Sandhurst By-law No. VII, sec. 3, cl. 4, 16, 18.

(*t*) *Roscrow v. Webster*, 5 W.W. & A'B. (M.) 64 (1868); and see *Bryson v. M'Carthy*, 6 W.W. & A'B. (M.) 35; N.C. 18 (1869).

(*u*) 38 Vic. No. 11 (Q.), sec. 62 Vic. No. 24 (Q.), sec. 8.

(*v*) *Sievers v. McAuly*, 1 Q.L.J. App. 54 (1879).

(*w*) 56 & 57 Vic. No. 587, Part VI; Regs. under Part XII.

(*x*) 62 Vic. No. 24 (Q.), sec. 8.

(*y*) Act No. 1120, sec. 55.

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 Other block
 claims.

With the ordinary claims known as block claims may be included prospecting claims, sluicing claims, tunnelling claims and others, which will be considered in a subsequent section of the present Chapter (*z*).

SECTION III.—MINING BOARD BY-LAWS.

Constitution of
 Mining Boards.

The mining boards were first instituted by the Act No. 32, and were by that Act authorised to make by-laws, which took the place of the local court regulations then in force. Under the *Mines Act* 1890 (No. 1120) the constitution of the mining boards is retained, and their powers are more definitely stated; while their powers and duties are further enlarged by the *Mines Act* 1897 (No. 1514). A mining board is constituted for each mining district, and consists of ten members, who are elected by holders of miners' rights who have held such rights for three months immediately preceding the day of polling (*a*). They are empowered to make by-laws for their respective districts, or for any division of a district, for any of the purposes set forth in the several sub-sections of section 106 of the Act No. 1120.

In other States.

Under the Mining Act of New South Wales (*b*) one mining board is constituted for the eight several mining districts, two of whose members are appointed by the Governor, and nine of whom are elected (sec. 65). In New Zealand the Mining Act (*c*) and the regulations thereunder take the place of by-laws; so, in the other States (*d*).

Defining claims.

It is necessary that the by-laws specify how the boundary lines of claims are to be drawn, otherwise they will be void

(*z*) See *post*, Sec. IX, "SUB-SIDIARY CLAIMS."

(*a*) Act No. 1120, Part I, Division I (12).

(*b*) 37 Vic. No. 13 (N.S.W.), sec. 9.

(*c*) 62 Vic. No. 38 (N.Z.)

(*d*) 56 & 57 Vic. No. 587 (S.A.), sec. 92; 62 Vic. No. 24 (Q.), Part XIV, sec. 247; 59 Vic. No. 40 (W.A.), sec. 99; 57 Vic. No. 24 (Tas.), Part XIII, sec. 170, and 59 Vic. No. 39 (Tas.), sec. 9.

for uncertainty (*e*), and they must also define the form of the claim (*f*). *Bk. I. Ch. II.
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If there is any question as to the validity of a by-law it must be tested by the mode of procedure prescribed by the Act No. 1120, sec. 108. The courts cannot entertain any question whether a by-law is *ultra vires* under sec. 106 (*g*). Testing validity
of by-laws.

Before a by-law is fully in force it must be certified as approved by the law officers of the Crown (*h*); and the date of coming into operation of by-laws dates from the certificate of approval, and not from the time when they were made by the mining board (*i*); section 107 of the Act No. 1120 has no retrospective operation. Neither can by-laws be made to operate retrospectively (*j*); and similarly, section 80 of the Act No. 291, preserving existing interests, relating to by-laws made before the coming into operation of that Act, was not retrospective, and would not make legal and valid by-laws that were previously illegal and invalid (*k*), but any possession, right, title or interest to any claim obtained under any by-law cannot be impeached on the ground only of the invalidity of the by-law. Approval by the
Crown.

Under the Act No. 32, section 111, mining boards could only make by-laws for the whole district for which they were appointed (*l*), but under the *Mines Act* 1890 by-laws can be made for any division of a district, and when so made are in force only in such division (*m*). Divisional
by-laws.

(*e*) *Linson v. Walsh*, Sup. Ct. Vic., March 23, 1860; *Argus*, March 24, 1860.

(*f*) *Edwards v. Ustice*, Sup. Ct. Vic., Nov. 29, 1860; *Argus*, Nov. 30, 1860. The foregoing cases were decided with regard to by-laws made under Act No. 32, sec 111, with which compare Act No. 1120, sec. 106 (iii), (xi), as to purposes for which mining boards may make by-laws.

(*g*) *Hunter v. McNulty*, 13 V.L.R. 416; 9 A.L.T. 33 (1887); as to questioning the validity of by-laws see *O'Malley v. Ward*, 1 W. & W. (L.) 277 (1862); *Jenkinson v. Cumming*, 1 W. & W. (L.) 337

(1862); *Sayers v. Jacomb*, 3 V.R. (L.), 132; 3 A.J.R. 66 (1872); *Duffy v. Tait*, 4 W.W. & A'B. (M.) 17 (1867); *Oxley v. Little*, 5 W.W. & A'B. (M.) 14 (1868); *Rider v. Phillips*, 10 V.L.R. (L.) 147; 6 A.L.T. 37 (1884).

(*h*) Act No. 1120, sec. 107.

(*i*) *Reardon v. Norton*, 5 V.L.R. (M.) 12 (1879).

(*j*) *Bond v. Watson*, 4 W.W. & A'B. (M.) 85 (1867).

(*k*) *Sayers v. Jacomb*, 3 V.R. (L.) 132; 3 A.J.R. 66 (1872); see Act No. 1120, sec. 2.

(*l*) *Jenkinson v. Cumming*, 1 W.W. (L.) 337 (1862).

(*m*) Act No. 1120, sec. 106.

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Construction of
by-laws.

In construing by-laws the courts will be guided by the same rules as are applied to Acts of Parliament (*n*); and where a right is given by a by-law, and by the same section of such by-law a remedy for its enforcement is provided, the right can be enforced only by the remedy given (*o*). When a by-law clashes with a statute, the statute must govern (*p*).

Rates made by
mining boards.

The mining boards have power to make by-laws for imposing rates on land, claims, plant and machinery for the purposes of section 106 (xv), (xvi) (*q*), and any person so rated may within one month after the rate is made appeal to the nearest court of petty sessions against the assessment (*r*).

SECTION IV.—OCCUPATION OF CLAIMS.

Right based on
possession.

The right to occupy any portion of Crown lands as a claim under the title of a miner's right is based on possession (*a*), followed by application for the claim in accordance with the by-laws of the district in which the claim is situated, and completion of the title by registration in the books of the mining registrar.

Limited to one
title.

A right to a claim based on possession must, however, be limited to one title, for the mining public are not, when insisting that the last title is bad, to be baffled by some other title; and if a claimholder feels afraid of some adverse title and buys it up, and takes an assignment and becomes registered as assignee of such former title, he takes all the benefit of such former title as his own, and loses the protection of his title previously acquired, which will be deemed

(*n*) *Lavelor v. Stiggants*, 2 V.L.R. (M.) 17 (1876).

(*o*) *Hunter v. Aratraveldt*, 3 W.W. & A'B. (M.) 59 (1866).

(*p*) *Coates v. South Loch Fyne G.M. Co.* (2), 25 V.L.R. 543; 6

A.L.R. 62 (1900).

(*q*) Act No. 1120, sec. 106 (xvi).

(*r*) *Ibid*, sec. 110.

(*a*) *Moore v. White*, 4 A.J.R. 17 (1873); *Warrior G.M. Co. v. Cotter*, 3 W.W. & A'B. (M.) 81 (1866).

to be abandoned by his taking an assignment of another title (b). *Bk. I. Ch. II.
sec. IV.*

It is a fundamental principle of the mining law that the holder of a miner's right cannot, without further warrant than entering on and marking out land, seize or take possession of ground which was previously occupied by another, or which is alleged to have been forfeited or constructively abandoned by the previous occupant; before the rights given by the Act can be acquired by miners they must adhere to the mode prescribed by the Act for determining those rights, and must not take on themselves to decide whether a forfeiture has been committed or not. Therefore, before the holder of a miner's right can avail himself of a forfeiture or constructive abandonment of a claim in the actual possession of other miners, he is bound first to obtain the adjudication of the Warden on the subject (c); and the same principle applies to persons seeking to deprive miners in possession of too much ground (d). *Critchley v. Graham.*

Under the Queensland Goldfields Act the same principle was followed, and it was held that if a party was in possession of a claim any person seeking to obtain possession of it must apply to the Warden; by taking forcible possession without adjudication he would forfeit all right or title he might have acquired or possess (e). Followed in Queensland.

The case of *Critchley v. Graham* was decided under a former Goldfields Act (f), but the principle is upheld under the Act No. 1120, and is an established principle of mining law which has, in fact, been echoed by the by-laws on most of the goldfields (g). "The Act No. 32, upon which *Critchley* Applied to Act No. 1120.

(b) *Barton v. Band of Hope & Albion Consols* (3), 6 V.L.R. (M.) 1; 1 A.L.T. 145 (1880); *United Extended Band of Hope Co. v. Tennant*, 3 W.W. & A'B. (M.) 41 (1866).

(c) *Critchley v. Graham* (2), 2 W. & W. (L.) 211 (1863); *Fahey v. Koh-i-noor Q.M. Co.*, 3 W.W. & A'B. (M.) 4 (1866); *Hunter v. Avatraveldt*, 3 W.W. & A'B. (M.) 59 (1866).

(d) *Barlow v. Hayes*, 4 W.W. & A'B. (M.) 67 (1867).

(e) *Sievers v. McAuly*, 1 Q.L.J. App. 54 (1879).

(f) Act No. 32, sec. 77.

(g) *Barlow v. Hayes*, *supra*; *Mulcahy v. Walhalla G.M. Co.*, 5 W.W. & A'B. (E.) 103 (1868); on appeal to the Privy Council, see 40 L.J.P.C. 41; and see judgment of the Privy Council in 2 A.J.R. 93.

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v. *Graham* was decided, embraces cases not merely of claims forfeited or deemed to be abandoned, but cases of persons claiming the possession of lands of which any other person has possession or claims to occupy under the Act" (*h*).

Application of
the principle.

But the principle established in the case of *Critchley v. Graham* does not apply to cases of actual or intentional abandonment (*i*); and will not bar the holder of a miner's right from taking possession as a claim of land the lease of which has expired by effluxion of time (*j*); nor where a default has been made in the application for a lease (*k*); though the principle will apply to a claim taken up under a by-law which is *ultra vires* (*l*); and to persons in actual occupation, though the possession be irregular (*m*); and to a claim marked out previous to the expiration of a mining lease of the same ground (*n*).

Renewal of
miner's right.

The holding of the miner's right in force under which a claim is held is essential to the legal occupation of the claim; for the right to mine, which originates in possession, terminates with the cesser of use of the land possessed (*o*), and termination of a miner's right without renewal terminates the title held under it (*p*), which termination can be taken advantage of by any holder of a miner's right instituting proceedings for possession at any time before the renewed miner's right is taken out (*q*).

What ground
may be taken.

Any Crown land unoccupied, or land occupied as a claim if liable to forfeiture, may be taken possession of as Crown land by any holder of a miner's right (*r*). In New South

(*h*) *Per* Molesworth, Ch. Judge, in *Vallancourt v. O'Rorke* (1). 1 V.R. (M.) 43; 1 A.J.R. 158 (1870).

(*i*) *Keast v. D'Angri*, 4 A.J.R. 61 (1873); *Collins v. O'Dwyer*, 5 W.W. & A'B. (M.) 30 (1868).

(*j*) *Durant v. Jackson*, 1 V.L.R. (M.) 6 (1875).

(*k*) *Antony v. Dillon*, 15 V.L.R. 240; 10 A.L.T. 231 (1889).

(*l*) *Bottrell v. Waverley G.M. Co.*, 2 V.R. (M.) 16; 2 A.J.R. 133 (1871).

(*m*) *Barker's G.M. Co. v. Keating*, 1 V.R. (M.) 18; 1 A.J.R. 55

(1870).

(*n*) *Cooper v. White*, 4 V.L.R. (M.) 10 (1878); and see *post*, Bk. I, Ch. V, Sec. I, "ABANDONMENT," and Sec. II, "FORFEITURE."

(*o*) *Warrior G.M. Co. v. Cotter*, 3 W.W. & A'B. (M.) 81 (1866).

(*p*) *Lennox v. Golden Fleece and Heales Co.*, 5 A.J.R. 18 (1874).

(*q*) *Vial v. Allender*, 23 V.L.R. 516; 19 A.L.T. 161; 4 A.L.R. 17 (1898); *Truswell v. Woods*, 5 A.L.R. 62; 20 A.L.T. 210; 24 V.L.R. 742 (1899).

(*r*) *Keast v. D'Angri*, 4 A.J.R.

Wales (*s*), South Australia (*t*), New Zealand (*u*), Queensland (*v*), Western Australia (*w*) and Tasmania (*x*) only proclaimed goldfields are available for mining. Any lease or licence for other than mining purposes may be cancelled subsequent to the proclamation of a goldfield; the cancellation and proclamation need not be cotemporaneous (*y*). A holder of a miner's right may take up a claim as trustee for and may confer an equitable interest in it upon another person, even though such person does not hold a miner's right (*z*). A married woman is also a person entitled to take out a miner's right, and to take up a claim under it, but *quere* whether the claim would not at once become the property of her husband (*u*).

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In taking possession of a claim it is absolutely necessary that the by-laws be complied with in every particular (*b*); and the claim so taken up must be occupied and worked strictly in accordance with such by-laws. "In this country mining claims may be taken up by anybody without incurring any expense. When public property can be thus taken up, rules are necessary to secure its proper use by those in possession of it, and local bodies in different districts have been empowered to make regulations as to the rights thus acquired. Every person who takes up a claim in the district knows, or is supposed to know, what are the by-laws under which he will have to work it, and must judge for himself whether it will be worth his while to take it up" (*c*).

Compliance
with by-laws.

Persons in actual possession of a claim have a good title

Title by possession
against
wrongdoers.

61 (1873); *Truswell v. Poining*, 1 V.R. (M.) 13; 1 A.J.R. 18 (1870).

(*s*) 37 Vic. No. 13 (N.S.W.), sec. 10.

(*t*) 56 & 57 Vic. No. 587 (S.A.), sec. 49.

(*u*) 62 Vic. No. 38 (N.Z.), sec. 10.

(*v*) 62 Vic. No. 24 (Q.), sec. 5.

(*w*) 59 Vic. No. 40 (W.A.), sec. 7.

(*x*) 57 Vic. No. 24 (Tas.), secs. 7, 17.

(*y*) *McAndrew v. McLean*, 2 N.Z.C.A. 198 (1872); affirmed 43 L.J.P.C. 69; 2 N.Z.C.A. 223; 1

N.Z.J.R. 178 (1874).

(*z*) *Volunteer Extended Co. v. Grand Junction Co.*, 4 W.W. & A'B. (M.) 6 (1867).

(*a*) *Foley v. Norton*, 4 V.L.R. (M.) 13 (1878); see the *Married Women's Property Act* 1890 (54 Vic. No. 1116).

(*b*) *Thomson v. Land*, 3 W.W. & A'B. (M.) 13 (1866); *Bevan v. Rigby*, 2 V.L.R. (M.) 7 (1876).

(*c*) *Per Molesworth*, Ch. Judge, in *Duffy v. Tait*, 4 W.W. & A'B. (M.) 17 (1867).

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by their occupation as against trespassers, and can resist a suit for encroachment (*d*); and possession alone is sufficient evidence of title as against a mere wrongdoer (*e*); and if a person purports to take up any Crown land as a claim under his miner's right, although the ground so taken may have been previously applied to a public use, any other miner seeking to take advantage of the illegality or defect must, in accordance with the dictum of *Critchley v. Graham*, take legal proceedings for possession instead of taking the ground himself (*f*).

SECTION V.—TITLE TO CLAIMS.

Quasi per-
manent estate.

A claimholder is for all practical purposes possessed of his claim for a permanent estate as regards the public, and such estate is determinable only by voluntary abandonment *de facto*, or by those breaches of conditions which amount to a constructive abandonment or a forfeiture (*a*); no one has any right to interfere with his title, and the grant of a lease which comprises land lawfully held at the time as a claim has no effect on the title of the claimholder (*b*). Possession under a miner's right in conformity with the by-laws gives a title to the claim and to all gold in it (*c*), whether quartz or alluvial (*d*); but the holder of a miner's right (*e*) has no interest until he acquires a claim in compliance with the Goldfields Act and the by-laws or regulations under it (*f*). The miner's right under which a claim is held

Miner's right
title.

(*d*) *Barker's G.M. Co. v. Keating*, 1 V.R. (M.) 18; 1 A.J.R. 55 (1870).

(*e*) *Cruise v. Crowley*, 5 W.W. & A'B. (M.) 27 (1868).

(*f*) *Vallancourt v. O'Rorke* (1), 1 V.R. (M.) 43; 1 A.J.R. 158 (1870); see *post*, Bk. I, Ch. IV, "WRONGFUL INTERFERENCE WITH MINING INTERESTS."

(*a*) *Mulcahy v. Wathalla Co.*, on appeal to Privy Council, 40 L.J. P.C. 41; 2 A.J.R. 93 (1867).

(*b*) *Coates v. South Loch Fyne G.M. Co.* (2), 25 V.L.R. 543; 6 A.L.R. 62 (1900), following *Alma Consols G.M. Co. v. Alma Extended Co.*, 4

A.J.R. 144, 190 (1873), and *Aladdin G.M. Co. v. Aladdin and Try Again United G.M. Co.*, 6 W.W. & A'B. (E.) 266 (1869).

(*c*) *McGill v. Tatham*, 2 W.W. & A'B. (L.) 52 (1864).

(*d*) *Scottish and Cornish G.M. Co. v. Great Gulf G.M. Co.*, 2 W.W. & A'B. (L.) 103 (1865); *Harwood v. Coster*, 2 W.W. & A'B. (L.) 163 (1865).

(*e*) Under 38 Vic. No. 11 (Q.).

(*f*) *Osborne v. Morgan*, 2 Q.L.J. 113 (1886); affirmed 13 App. Cas. 227 (1888).

is the title to the claim, and the title thus acquired is completed by registration as required by the Act and the by-laws, and is based on possession; a defendant in a suit cannot set up a title not duly registered at the time of the trial (*g*). But a miner's right is no part of the title to a claim beyond the limits prescribed by the Act (*h*), even though the holder may be registered for it; and under the Ballarat by-laws (*i*) only a claimholder who is registered for a claim in the books of the mining registrar can obtain the benefit of the by-laws permitting suspension of work during a period of protection registration (*j*). But registration alone will not give a title; the mere possession of a claim, though not strong or satisfactory evidence of title, may, in the discretion of the Warden, on an application for injunction, be deemed a sufficient title for the purpose, but otherwise, where the evidence of title to a claim is a recent transfer, it will in such case require to be supported by showing the title of the transferrer, or something else (*k*).

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Registration.

As regards the Crown the interest which the holder of a miner's right has in his claim is at the utmost an estate at will, terminable by exemption of the land from occupation for mining purposes at any time, and for an estate of this nature an action of ejectment cannot be brought in the Supreme Court (*l*).

How title determined.

A share or interest in a claim may be assigned to a person not holding a miner's right, if the miner's right appropriated to the share or interest be assigned with it (*m*). And a person having a share or interest in a claim with others cannot be excluded from such share or interest without his consent; so where the owners of a claim, excluding one of

Assignment.

(*g*) *Moore v. White*, 4 A.J.R. 17 (1873).

(*h*) *Harris v. Labes*, 1 N.Z.J.R. (N.S.) M.L. 10 (1872).

(*i*) Ballarat By-law No. VII, No. VIII, sub. iv, *Gov. Gazette*, 1869, p. 1729.

(*j*) *Thompson v. Begg*, 2 V.R. (M.) 1; 2 A.J.R. 34 (1871); and see

62 Vic. No. 38 (N.Z.), sec. 83; 62 Vic. No. 24 (Q.), sec. 16.

(*k*) *Grant v. Lawlor*, 3 V.L.R. (M.) 15 (1877).

(*l*) *Jennings v. Kinsella*, 1 W.W. & A'B. (L.) 47 (1864).

(*m*) *Cawley v. Ling*, 6 W.W. & A'B. (M.) 12 (1869).

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them, affected to deal with the claim in forming a new company, though the excluded partner has no right to object to other shareholders forming themselves into a company and assigning shares to him, or totally excluding him from the company, yet such shareholders have no right to appropriate to themselves the share in the claim of such excluded partner, and he may enforce his title to his share or interest in the claim (*n*).

Multiplying
miners' rights.

Under the Act No. 1120, Part I, the holder of a miner's right cannot take up and hold more than one man's ground as a claim. One person is not allowed to multiply himself or his powers by multiplying his miner's right unless the by-laws expressly enact that multiplied miners' rights should give power to take up multiplied quantities; and thus one person cannot, in the absence of an authorising by-law, by obtaining five miners' rights in his own name take up and retain possession of five men's ground (*o*). But a by-law empowering the holder of one miner's right to take up several men's ground under it is not *ultra vires* (*p*); and under a by-law permitting one man holding a miner's right to hold not more than fifty men's ground, a holder of a miner's right may take up, or become the transferee of, claims not exceeding fifty men's ground (*q*). So, after claims have been taken up and registered, such claims and the several miners' rights under which they are taken up may be transferred to a purchaser from several partners (*r*).

When occupa-
tion not regular.

When two adverse persons are in possession of the same claim the law accords possession to him who has the title(s); and where persons are in actual occupation of ground, though the occupation may not be strictly legal or regular, other

(*n*) *Parle v. Harp of Erin Amalgamated Q.M. and Crushing Co.*, 3 W.W. & A'B. (E.) 9S (1866); *Warrior G.M. Co. v. Cotter*, 3 W.W. & A'B. (M.) 81 (1866); and see *post*, Bk. III, Ch. I, "MINING PARTNERSHIPS."

(*o*) *Cawley v. Ling*, *supra*; *Milne v. Morell*, 3 V.R. (M.) 4; 3 A.J.R.

21 (1877).

(*p*) *Crocker v. Wigg*, 5 W.W. & A'B. (M.) 20 (1868).

(*q*) *Baker v. Wong Pong*, 8 V.L.R. (M.) 28; 4 A.L.T. 28 (1882).

(*r*) *Cawley v. Ling*, *supra*.

(*s*) *Clarke v. Tressider*, 4 W.W. & A'B. (L.) 164 (1867).

persons have no right to come in upon them and disturb such possession, but can only take advantage of any defect in the title by proceeding before the Warden or in the Court of Mines (*t*).

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It is a question whether a title under a miner's right is liable to forfeiture for omission to renew such miner's right is restored by one being taken out before any adverse proceedings are taken; but a title could be defeated by a registration during the period of omission (*u*). In a late case it was held that a title was not absolutely invalidated by neglect to take out a miner's right immediately on or before the expiration of the last one taken out (*v*).

Title restored
by renewal of
miner's right.

The courts will jealously guard the rights and interests of litigants coming before them, and a claimholder whose title is the subject of litigation will not be allowed to retain the proceeds of his claim pending litigation. Where the title to auriferous land is in dispute the gold should be retained till the rights of the parties have been ascertained, no practical injury being inflicted on either side, the mine being worked under restrictions, so as to ensure that the balance after deducting the necessary expenses being placed in a bank should be available to either plaintiffs or defendants, whichever might be ultimately held entitled to it (*w*).

Proceeds of
claim pending
litigation.

SECTION VI.—AMALGAMATION OF CLAIMS.

The amalgamation of claims is contemplated and authorised by the *Mines Act* 1890 (*a*) in cases where adjoining claimholders have agreed to work in partnership. It is the usual

Authorised by
Act No. 1120.

(*t*) *Barker's G.M. Co. v. Keating*,
1 V.R. (M.) 18; 1 A.J.R. 55 (1870).

(*u*) *Summers v. Cooper* (1), 5
V.L.R. (M.) 22; 1 A.L.T. 46 (1879).

(*v*) *Truswell v. Woods*, 24 V.L.R.
742; 5 A.L.R. 62; 20 A.L.T. 210
(1899), following *Vial v. Allender*,
23 V.L.R. 516; 4 A.L.R. 17; 19

A.L.T. 161 (1898).

(*w*) *Band of Hope and Albion
Consols v. Young Band Extended Co.*
(1), 8 V.L.R. (E.) 120; 3 A.L.T.
125 (1882).

(*a*) No. 1120, sec. 8, amended by
No. 1514, sec. 10.

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practice to amalgamate small claims adjoining each other where the depth of working is such that the separate claimholders would be at great expense in working a number of small claims, in cases where the whole ground could be more profitably and more expeditiously worked as a single claim (*b*).

Amalgamation
of bad titles.

The titles to the several claims must be good before the amalgamation, and the amalgamation of a claim liable to forfeiture with other ground legally held will not cure the forfeiture (*c*); nor will subsequent working of the claim cure a forfeiture previously incurred (*d*), for where amalgamation is effectual for all purposes of working it is also effectual for all liabilities for not working, and all excuses for not working (*e*).

Irregular
marking.

In a case under the Beechworth by-laws (*f*) where a party took up four adjoining claims by erecting four posts only, one at each angle of the ground taken up, and registered each claim separately, and afterwards registered them as one amalgamated claim; it was held that they should in the first instance have marked off each claim separately as a distinct claim, and that they had not priority over persons who had properly marked out such claims (*g*); and it was subsequently held under the same by-laws that several persons taking up ground of dimensions to which they are jointly entitled may take possession effectually by pegging and trenching the entire area and not the separate single men's ground (*h*). The distinction between the two cases is apparent. In the latter case the ground was marked out and taken up as one amalgamated claim by a party of miners, whereas in *Holt v. Pratt* (*g*) separate claims were

(*b*) Amalgamation of claims is also authorised in the other States. See 56 & 57 Vic. No. 587 (S.A.), sec. 46; 37 Vic. No. 13 (N.S.W.), sec. 17; 62 Vic. No. 24 (Q.), sec. 3; 59 Vic. No. 40 (W.A.), sec. 4; 62 Vic. No. 38 (N.Z.), sec. 129.

(*c*) *Clerk v. Wrigley*, 4 W.W. & A'B. (M.) 74 (1867).

(*d*) *Coles v. Sparta*, 3 W.W. &

A'B. (M.) 21 (1866).

(*e*) *Seal v. Behro*, 5 V.L.R. (M.) 4 (1879).

(*f*) Beechworth By-laws, Nov. 19, 1867.

(*g*) *Holt v. Pratt*, Ch. Ct. of Mines, Dec. 1, 1868; *Argus*, Dec. 2, 1868.

(*h*) *Lightbourne v. Stitt*, 1 A.J.R. 71 (1870).

registered by each individual without being individually marked out, and subsequent amalgamation did not cure the defect.

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In the case of *The Parade G. M. Co. v. The Victoria United Co.* (i) it was held that if an amalgamation of claims were irregular it had the effect of throwing the owners back on their original titles under their single claims, and reviving the rights under the claims prior to amalgamation; this ruling, however, which was in an interlocutory application, was reversed in the case of *Donaldson v. Llanberis Co.* (j), where it was decided that where an amalgamated claim had been registered, a new title had been created and the old ones abandoned, and that the previous registered titles to the claims amalgamated could not be relied on (k).

Irregular
amalgamation.

Amalgamation of claims unites them as to work on one of them saving a forfeiture of the others, but not as to making a trespass upon one a trespass upon all (l); it gives important new rights, especially the preserving from forfeiture any part by working on other parts (m); for immediately on amalgamation the several amalgamated claims previously held separately become one single claim, which is thereafter worked as a single claim, and is subject to the same liabilities, as it is entitled to the same privileges, as if such amalgamated claim had been originally taken up as a single claim.

Effect of
amalgamation.

In a New South Wales case it was held that a miner must be the holder or actual possessor of a claim before he could amalgamate it with claims of others; and that amalgamation does not constitute a partnership in respect of such claims, but only enables separate claimholders to work together and mingle their produce (n).

Does not constitute partner-
ship.

(i) 3 V.L.R. (E.) 24 (1877).

(j) 9 V.L.R. (M.) 21; 5 A.L.T. 54 (1883).

(k) Ballarat By-laws No. XI, sec. iv; and see *United Extended Band of Hope Co. v. Tennant*, 3 W.W. & A'B. (M.) 41 (1866), quoted in the above cases.

(l) *St. George & Band of Hope Co. v. Band of Hope & Albion Consols*, 2 V.R. (E.) 206; 2 A.J.R. 81, 127 (1871).

(m) *Donaldson v. Llanberis Co.*, *supra*.

(n) *Ex parte McInnes*, 9 N.S.W. S.C.R. (L.) 28 (1870).

SECTION VII.—LAND EXEMPTED FROM OCCUPATION AS A CLAIM.

(a) Reserves for Public Purposes.

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What land is
exempt.

Certain Crown lands are exempted from occupation for mining purposes by section 15 of the Act No. 1120 (a), and the Governor-in-Council has power under section 17 (amended by section 11 of Act No. 1514) to except from such occupation any specific portion or class of Crown land. In New Zealand Native lands are exempted, but may be available for mining purposes in certain cases (b).

Land reserved
for sale.

Thus, land reserved for a public use or purpose cannot be taken up as a claim; though were land was only reserved for sale and was not dedicated to any specific purpose (c), it was not thereby taken out of the operation of the Mining Act, and the title of miners in occupation of it was not invalidated (d).

Reserve to
public use.

Reservation to a public use or purpose is sufficient to exempt land from occupation under miner's right, without the necessity of improvements being effected on it, and land reserved for a park need not necessarily be enclosed for the purpose of dedication to the use of the public, any more than a road must necessarily be fenced in and metalled to be a road (e); and permissive occupancy, granted by the Governor-in-Council, of land "to be used for recreation and gymnastic purposes," was held under the Act No. 32, sec. 4, to be a sufficient reservation or application to a public purpose of the land, so as to prevent it being taken up as a claim (f). Land proclaimed as a common is not deemed to be applied to a public use or purpose (g).

Commons.

(a) See also as to other States 37 Vic. No. 13 (N.S.W.), sec. 25; 56 & 57 Vic. No. 587 (S.A.), sec. 8; 62 Vic. No. 38 (N.Z.), sec. 23; 62 Vic. No. 24 (Q.), sec. 46; 59 Vic. No. 40 (W.A.), sec. 21; 57 Vic. No. 24 (Tas.), sec. 57.

(b) 63 Vic. No. 38 (N.Z.), secs. 25, 28.

(c) Under *The Crown Lands Act* 1860 (24 Vic. No. 117).

(d) *Att-Gen. v. Southern Freehold*

Co., 4 W.W. & A'B. (E.) 66 (1867); *Att-Gen. v. United Hand in Hand & Band of Hope Co.*, 4 W.W. & A'B. (E.) 66 (1867).

(e) *Att-Gen. v. Southern Freehold Co.*, *supra*.

(f) *United Sir William Don G. M. Co. v. Koh-i-noor Q.M. Co.*, 3 W.W. & A'B. (M.) 63 (1866); and compare with above section Act No. 1120, sec. 15.

(g) Act No. 1120, sec. 16.

The Governor-in-Council cannot apply Crown lands previously held as a claim to a public use or purpose under section 15 of the Act No. 1120, but he may under section 17 exempt such land from further occupation under miner's right, and then use the land without regard to the rights of the claimholder. The words used in section 17 are quite sufficient for this purpose, as to the commencement and continuance of mining; "for a claimholder might hold for ever, in spite of the greatest public inconvenience, land wanted for public purposes, unless some words were found in the Act authorising the Crown to terminate his interest in the claim" (*h*). A proclamation under 37 Vic. No. 13 (N.S.W.), secs. 22, 26, reserving land from occupation for mining purposes, does not operate so as to extinguish the rights of the holder of a business licence then in occupation of such land (*i*).

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Sec. VII.*
Land held under
miner's right.

It was held in the case of *The Parade G. M. Co. v. The Royal Harry Q.M. Co.* (*j*) that the subsoil of Crown lands applied to any public purpose, or held under miner's right or business or other licence (as distinguished from a mining lease) might be within the limits of a claim, and unless excepted by the Governor-in-Council might be mined upon, so long as the surface rights were not interfered with; but *The Residence Areas Act* (*k*), validating gold mining leases below the surface of residence areas, prohibits any person not being the holder of a lease from mining thereunder, and consequently such area could not be included (either on or below the surface) in a claim held under miner's right (*l*). But such land may be exempted from occupation as a resi-

Subsoil of
reserves.

Residence areas.

(*h*) *Per* Molesworth, Ch. Judge, in *Wakeham v. Cobham*, 1 V.R. (M.) 34; 1 A.J.R. 93 (1870).

(*i*) *Wilkinson v. Harris*, 9 N.S.W. L.R. (L.) 70; 4 W.N. 159 (1888).

(*j*) 2 V.L.R. (L.) 214 (1876); following *In re Rogers, ex parte Bunn*, Sp. Ct. Vic., Nov. 24, 1859; *Argus*, Nov. 25, 1859, and *Meredith v. Bunn*, Sp. Ct. Vic., April 4, 1860; *Argus*, April 5, 1860; *Sims v. Demamiel*, 21 V.L.R. 634; 17

A.L.T. 129, 241; 2 A.L.R. 51 (1896).

(*k*) 45 Vic. No. 709; consolidated by Act No. 1120, secs. 46, 47; and see Act No. 1514, Part I, sub. 2.

(*l*) *St. George and Band of Hope Co. v. Band of Hope and Albion Consols*, 2 V.R. (E.) 206; 2 A.J.R. 81, 127 (1871); and see *post*, Bk. III, Chap. IV, "SITES FOR RESIDENCE AND BUSINESS."

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dence area (*m*), when it becomes available for mining subject to payment of compensation. And the same law obtains in the other States (*n*).

Reserve of
creek.

A reservation in a gold-mining lease of a creek, with liberty of access to it, will protect the creek from occupation for alluvial mining under a miner's right, such occupation not being based upon any legal proceeding (*o*).

Removing soil.

The restriction in the *Land Act* (*p*) against removing soil from Crown lands applies to searching for on, or removing from, such Crown lands that which has always been there *in situ*, and not that which by human means may have been deposited there, such as quartz tailings or mullock (*q*).

Abandoned
claim.

An abandoned claim (New South Wales) having been exempted from occupation under miner's right by proclamation previous to the abandonment, cannot be taken possession of for mining purposes so long as the proclamation stands (*r*).

(b) Public Highways.

Mining on roads.

The Act No. 1120, Part I, authorizes the holder of a miner's right or of a mining lease to mine upon or under any street, road, or highway, on certain conditions as to prevention of injury to property, or obstruction to the highway, and provides for a permit being issued for the purpose by the body having the care and management of the highway (*a*); but the grant by such body to the holder of a miner's right of an order permitting him to mine on or under the road does not of itself entitle him to use the subsoil for the purpose of extracting gold; the authority to do so is conferred by the miner's right, the permit being only

(*m*) Act No. 1514, sec. 24.

(*n*) Regulations under *The Mining Act* 1893 (S.A.), cl. 78, 79; 37 Vic. No. 13 (N.S.W.), secs. 26, 27; 57 Vic. No. 24 (Tas.), sec. 191; 59 Vic. No. 40 (W.A.), secs. 22, 23; 62 Vic. No. 24 (Q.), sec. 23.

(*o*) *Walhalla G.M. Co. v. Jen-*

nings, 1 V.L.R. (M.) 12 (1875).

(*p*) 54 Vic. No. 1106, sec. 114.

(*q*) *Potter v. Wilkins*, 2 V.L.R. (L.) 47 (1876).

(*r*) *Murphy v. Cooke*, 2 W.N. (N.S.W.) 55 (1886).

(*a*) Act No. 1120, sec. 19.

for the purpose of making sure that the surface soil is not injured (*b*). A street or road cannot, however, be taken up as a claim under the by-laws, and the Warden has no jurisdiction to adjudicate on a summons seeking a declaration of forfeiture and to be put in possession of such street or road (*c*). The Warden may, however, grant an injunction against a miner on private land restraining him from encroaching on roads adjoining his claim (*d*). But land must be legally made and proclaimed a road before it is excepted from occupation as a claim (*e*).

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The Court of Mines has jurisdiction to grant an injunction by one party of miners, mining underneath a public street, against another party interfering with them, although the land mined upon could not be held under miner's right as a claim, on the principle that the earliest in possession is entitled to protection against a mere wrongdoer (*f*).

Jurisdiction of
Court of Mines.

A permit to mine under streets or roads given by a municipal council does not merely remove obstructions to acquiring title, but confers privileges unconnected with any other title, and does away with the necessity of applying for the ground or registering it under the by-laws, and such title is good, except as against the real owner (*g*); but a permit to mine is not to be relied on as conferring title; it is simply a privilege granted by the clemency of the governing body, and is no guarantee of title (*h*).

Permit to mine.

(*b*) *Sims v. Demamiel*, 21 V.L.R. 634; 2 A.L.R. 51; 17 A.L.T. 129, 241 (1896), following *Parade G.M. Co. v. Royal Harry Q.M. Co.*, 2 V.L.R. (L.) 214 (1876), and *Reg. v. Brewer and Walhalla Co.*, 4 W.W. & A'B. (L.) 124 (1867), and dissenting from *Extended Hustler's Freehold Co. v. Moore's Hustler's Freehold Co.*, 5 A.J.R. 116 (1874).

(*c*) *Schonfeldt v. Beel*, 1 V.L.R. (M.) 1 (1875); *House v. Ah Sue*, 2 W. & W. (L.) 41 (1863); *St. George and Band of Hope Co. v. Band of Hope and Albion Consols*, 2 V.R. (E.) 206; 2 A.J.R. 81, 127 (1871).

(*d*) Act No. 1514, sec. 103, *et seq.*

(*e*) *Mayor &c. of Eaglehawk v. Waddington*, 5 W.W. & A'B. (M.)

6 (1868); as to mining on public roads in other States, see 56 & 57 Vic. No. 587 (S.A.), secs. 8, 36; 57 Vic. No. 24 (Tas.), Part V (1), sec. 58; 37 Vic. No. 13 (N.S.W.), sec. 28; 63 Vic. No. 29 (N.Z.), sec. 18, *et seq.*

(*f*) *In re Rogers, ex parte Bunn*, Sp. Ct. Vic., Nov. 24, 1859; *Argus*, Nov. 25, 1859; *Meredith v. Bunn*, Sp. Ct. Vic., April 4, 1860; *Argus*, April 5, 1860; *Band of Hope Q.M. Co. v. Williams Freehold Co.*, 2 V.L.R. (E.) 257 (1879).

(*g*) *Extended Hustler's Freehold Co. v. Moore's Hustler's Freehold Co.*, 5 A.J.R. 116 (1874); and see *Sims v. Demamiel, supra*.

(*h*) *Carvalho v. Black Hill South*

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Obligation of
council.

A municipal council has no option of either granting or refusing an application to mine on a road under its control. It must consider the application, and cannot simply decline to entertain it. The words of the Act are emphatic—the council shall decide whether the same (*i.e.* mining upon or under streets or roads) can be effected without injury (*i*). Their decision, however, should not be made without due consideration of the probable effects of mining on the surface of roads, for a council which has granted permission to mine upon public streets is not absolved from the responsibility cast upon it as managers to take care that the streets are preserved in good order (*j*). Therefore, if subsidence occurs in a road through mining, it is the duty of the council as between it and the public to repair and make good the road, the question of damage being left as an individual matter between the council and the person causing the injury.

Surface of roads.

Reservation of a road is not a reservation of the soil underneath it, but merely the right of passing over it (*k*). The surface of the road is under the control of the municipal body, the land of all roads being vested in the Crown (*l*); and the council has no control over the soil underneath a road. Public streets are not usually allowed to be occupied for mining purposes, but where the local body sees no objection to such occupation and grants a permit, sections 18 and 19 of the Act No. 1120 provide for occupation of exempted or excepted land with the approbation of the Governor-in-Council (*m*).

Evidence of
dedication.

A Crown grant referring to a road and accompanied with user is sufficient evidence that the road has been dedicated

Extended Q.M. Co., 1 V.L.R. (L.) 225 (1875); *St. George & Band of Hope Co. v. Band of Hope & Albion Consols*, 2 V.R. (E.) 206 (1871); on appeal, 2 A.J.R. 81, 127.

(i) *Reg. v. Mayor &c. of Sebastopol and The St. George & Band of Hope United Co.*, 2 V.R. (L.) 103; 2 A.J.R. 64 (1871).

(j) *Badenhop v. Mayor &c. of Sandhurst*, 1 W.W. & A³B. (L.) 136

(1864).

(k) *Reg. v. Davies* (1), 6 W.W. & A³B. (L.) 246; N.C. 7, 16, 24.

(l) By the *Local Government Act* 1890 (54 Vic. No. 1112, sec. 395), "the absolute property of land reserved or proclaimed as a road, street, or highway" is vested in the Crown.

(m) *Holmes v. Reynolds*, 11 V.L.R. 711 (1885).

to the public use (*n*); but cutting through a track outside a claim for the purpose of making a tail race, and altering the track, which altered track was afterwards used by the public, does not by permissive user alone constitute a dedication to the public (*o*).

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A creek which has been reserved for public purposes, and which has been taken under the management of a municipal council as a road, and which has been used by such council, is similar to a road, the control of which is vested in such council, and cannot be taken up and worked as a claim without the permission of the council (*p*). Where a miner interfered with a creek which had been permanently reserved for public purposes, without the consent of the municipal body, such interference consisting in conducting mining operations as the holder of a mining lease from the Crown of land comprising the creek, it was held that on an information under the *Local Government Act* for unlawfully interfering with the creek a difficult question of title was involved, and the jurisdiction of the justices was ousted (*q*).

Reserve of
creek.

If, however, land is a properly dedicated street or road miners have no right to disturb or injure it, and on a complaint before justices against such miners for disturbing the soil of a street, the occupation of the miners cannot be put forward to oust the jurisdiction of the justices on the ground that a question of title is involved (*r*).

Disturbing soil.

It has been held in several cases that the owner of land abutting on a public street or road was owner *ad medium filum viæ*, and might maintain trespass against any person trespassing on his half (*s*); but by a subsequent judgment

Doctrine of
medium filum.

(*n*) *House v. Ah Sue*, 2 W. & W. (L.) 41 (1863).

(*o*) *Johnson v. Ralph*, Sp. Ct. Vic., March 24, 1865; *Argus*, March 27, 1865.

(*p*) *Reg. v. Mayor &c. of Walhalla*, *ex parte O'Grady*, 4 V.L.R. (L.) 470 (1878).

(*q*) *Haughton v. Hockings*, 24 V.L.R. 907; 5 A.L.R. 107 (1899); *Reg. v. Mayor &c. of Walhalla*,

supra, explained and distinguished, as in that case the creek was reserved for road purposes, and the land was taken up as a claim.

(*r*) *Koh-i-noor Mining Co. v. Drought*, 3 V.R. (L.) 75; 3 A.J.R. 48 (1872); see *Parade G.M. Co. v. Royal Harry Q.M. Co.*, 2 V.L.R. (L.) 214 (1876).

(*s*) *Carvalho v. Black Hill S. Extended Q.M. Co.*, 1 V.L.R. (L.)

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it has been definitely decided that the property in the soil *ad medium flum viæ* is not created by virtue merely of a grant from the Crown of land defined as being bounded by a distinctly marked road (*t*).

SECTION VIII.—THE EFFECT OF MARKING OUT A CLAIM FOR A LEASE.

Claimholder
may apply for
lease.

A claimholder is entitled to apply for a gold-mining lease of his claim, in which case the obtaining of the lease operates as an abandonment of his title under miner's right. If a person has a claim and applies for a lease of it, he is subject until the lease is granted to the forfeiture of his claim if he does not comply with the conditions to which the claim is subject (*a*); and the application for a lease cannot be set up as an excuse for breach of the by-laws, though immediately on the granting of the lease the miner's right title will merge in the leasehold title, and any forfeiture accruing under the former title will be cured by the latter title (Act No. 1120, sec. 68).

Effect of
application for
lease.

No one other than the holder of a claim has a right to apply for a lease of such claim; the title to a claim held under miner's right is good as against any other applicant for a lease. The claimholder is not bound to resist the granting of the lease by objecting to the application under the leasing regulations, but he may do so if he chooses; and should such a lease be granted he can protect himself against the lease by showing his lawful title (*b*).

Ground marked
pending appli-
cation.

But ground the subject of an application for lease cannot be marked out as a claim. The Act No. 1120, secs. 70, 71,

225 (1875); *Shamrock Co. v. Farnsworth*, 2 V.L.R. (E.) 165 (1876); *Band of Hope Q.M. Co. v. Williams Freehold Co.*, 5 V.L.R. (E.) 257 (1879); *Davis v. The Queen*, 6 W.W. & A'B. (E.) 106 (1869).

(*t*) *Garibaldi Co. v. Craven's New Chum Co.*, 10 V.L.R. (L.) 233; 6

A.L.T. 93 (1884).

(*a*) *Barker's G.M. Co. v. Keating*, 1 V.R. (M.) 18; 1 A.J.R. 55 (1870).

(*b*) *Stephens v. Jolly*, 5 A.J.R. 162 (1872); see *Aladdin G.M. Co. v. Aladdin and Try Again G.M. Co.*, 6 W.W. & A'B. (E.) 266 (1869); and Act No. 1120, secs. 65, 68.

prohibits all means of acquiring a claim pending an application for lease of the same ground, and therefore the holder of a miner's right has no authority to mark out as a claim ground the subject of an application for lease, and the Warden cannot put him in possession pending the application (c); so, in an application for a renewal of a lease (d); neither can the Warden declare a claim forfeited pending an application for a lease of the same ground by the claimholder, unless default in compliance with the leasing regulations be shown; but if a complaint seeking forfeiture be brought before him, the temporary obstruction of the marking out for a lease is a ground of adjournment from time to time until the application for lease is disposed of (e). If the lease be granted, the lessee will take his title under it; if the lease be refused, the Warden can then adjudicate on the complaint for forfeiture. But a lease, if obtained, will not be effectual against a person lawfully entitled and in occupation under a miner's right previous to the application for lease (f).

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Sec. VIII.*

However, this subject, *i.e.* the rights of a claimholder as against an applicant for a lease, and the rights of an applicant for a lease to immunity pending his application as against the holders of miner's rights, will be more fully discussed in a subsequent portion of this work, dealing with interests in gold-mining leases (g).

Rights of claimholder.

SECTION IX.—SUBSIDIARY CLAIMS.

In addition to the mining claims before mentioned the by-laws of all the mining districts provide for what may be called subsidiary claims, such as prospecting claims, creek

Claims not previously referred to.

(c) *Hutcheson v. Erk*, 3 V.L.R. (M.) 1 (1877).

(d) Act No. 1514, sec. 49.

(e) *Constable v. Pigtail Q.M. Co.*, 3 V.L.R. (M.) 7 (1877); *Hutcheson v. Erk*, *supra*; this ruling was questioned in *Cock v. Stavell Amalgamated Scotchman's and Cross Refs*

G.M. Co., 24 V.L.R. 165; 4 A.L.R. 219; 20 A.L.T. 85 (1898).

(f) *Stephens v. Jolly*, 5 A.J.R. 162 (1874); and see *Coates v. South Loch Fyne G.M. Co.* (2), 25 V.L.R. 543; 6 A.L.R. 62 (1900).

(g) See *post*, Book II, "INTERESTS IN GOLD-MINING LEASES."

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claims, sluicing claims, bank sluicing claims, tunnelling claims, machinery areas, dam sites, &c., all of which are a species of block claim, as the area taken up in each case is defined by metes and bounds in the same manner as an ordinary block claim (*a*).

Extended claims.

Most of the by-laws admit of extended claims being taken up on old worked and abandoned ground, the title to which is the same as that of an ordinary block claim, a slight difference being made in the form of application.

Areas for machinery.

Areas for the erection of machinery may also be taken up under the by-laws; but a person holding a machinery area or a dam site has no right to mine on it, as it is held for a special purpose and not as an ordinary mining claim. If he mines on such area he has no title to the gold in it, and he cannot claim title to a reef that passes through such area, his only title being that of unlawful occupation of the ground as a mining claim; though the holder of an adjoining claim following the dips and angles of a reef passing through a machine area (*b*) was held to be in constructive possession of the gold in such area (*c*). Failure to erect machinery within six months from the date of occupation, as required by the by-laws (*d*), will leave the area open to forfeiture (*e*).

Prospecting claims.

Prospecting claims are taken up at a certain distance, fixed by the by-laws, from the locality of any operative gold workings, and enlarged areas are granted, to be occupied provisionally as a prospecting area until the discovery of payable gold therein, after which the area is reduced to that of an ordinary claim (*f*).

Creek claims.

Creek claims are those which include the bed of a creek

(*a*) As to the variety of claims which may be taken up in South Australia, see Regs. under 56 & 57 Vic. No. 587 (S.A.), No. 30.

(*b*) See Maldon Local Court Regulations, rule 4, *Gov. Gazette*, March 6, 1857.

(*c*) *Virian v. Dennis*, 3 W.W. &

a'B. (M.) 29 (1866).

(*d*) Gippsland By-laws, No. 40.

(*e*) *Coates v. South Loch Fyne G.M. Co.* (1), 25 V.L.R. 51; 5 A.L.R. 276; 21 A.L.T. 223 (1899).

(*f*) As to prospecting areas on private land, see Act No. 1514, sec. 95.

or river, and are limited by the by-laws to a certain length in the direction of the course of the stream, and to a certain width. In New Zealand, where it is necessary for the Warden to define the banks of a stream, he must define the existing visible banks bounding the present bed of the stream (*g*).

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An ordinary sluicing claim is a form of block claim taken up in any portion of the district to be worked by water sluices, and includes the right to water privileges. The holders of sluicing claims are not entitled to sluice and run off debris and sludge on the Crown lands of their watershed, and on through other water channels and rivers of the country by virtue of their grants either of sluicing claims or of head races terminating at their claims, or of tail races (*h*); and where a holder of a sluicing claim cannot exercise his right to discharge water and debris from his claim without trespassing on his neighbour's land he is bound to refrain from exercising that right, and he may be held liable, although he is only one of a number of persons whose united acts are doing the injury (*i*). The measure of damages where a person is wrongfully deprived of his property is not the amount for which the use of the property might have been obtained voluntarily from the owner, had he desired to lease it; in such a case the Courts will not be nice in weighing the damages (*j*). In respect of sluicing claims there is nothing in the Act 30 Vic. No. 32 (N.Z.) (*k*) rendering the common law right of lateral support applicable to lands held for mining purposes (*l*). In Western Australia, by special enactment, leases may be granted for the purpose of sluicing and dredging for gold in any lakes, swamps, or marshes not suited for ordinary mining (*m*).

Sluicing claims.

(*g*) *Rush v. Newmann*, 7 N.Z.L.R. 117 (1888), under Act 50 Vic. No. 51 (N.Z.); see 62 Vic. No. 38 (N.Z.), secs. 80, 81.

(*h*) *Guffie v. Christian*, 1 N.Z.J.R. (N.S.) S.C. 96 (1875).

(*i*) *McMillan v. Great Extended Sluicing Co.*, 4 N.Z.L.R. S.C. 377 (1886).

(*j*) *Leary v. United Hercules Hydraulic Sluicing Co.*, 10 N.Z.L.R.

420 (1890).

(*k*) Compare Act 62 Vic. No. 38 (N.Z.), secs. 83-89.

(*l*) *Great Extended Sluicing Co. v. Hales*, Mac. (N.Z.) 896 (1871); and see *post*, Bk. III, Ch. III, Sec. IV, "NUISANCES."

(*m*) *The Sluicing and Dredging for Gold Act 1899* (63 Vic. No. 43 (W.A.), sec. 4.

- Bk. I. Ch. II.
Sec. IX.*
Bank sluicing
claims. Bank sluicing claims are those which do not include the bed of a creek or river, but include the ground on either side of it, and extend to a prescribed distance along the course of the creek, by a prescribed width regulated by the by-laws.
- Tunnelling
claims. Tunnelling claims are block claims taken with a view to work from tunnels instead of shafts, and the ground from the mouth of the tunnel to the face is frequently outside the boundaries of the claim altogether, the tunnel itself being merely in the nature of an easement to the claim.
- Machine and
dam sites. Machine areas for the erection of puddling or crushing plants &c., dam sites, and water privileges are also easements to the mining claims to which they are appurtenant.
- Special claims
(N.Z.). In New Zealand special claims as well as extended claims may be taken up (*n*) with extended areas, for working alluvial ground, quartz reefs, stream-beds, and sea beaches. All other claims are ordinary claims (*o*).
- By-laws. The by-laws regulating these subsidiary claims differ more or less in each of the mining districts according as circumstances may require, and in this respect the by-laws of each district are a law to the district itself.

(*n*) 62 Vic. No. 38 (N.Z.), sec. 75 ;
Regs. 15, 16.

(*o*) As to special claims applied for on land held on perpetual lease, see *In re McKenzie, ex parte Turnbull*, 16 N.Z.L.R. (S.C.) 291 (1898) ; as to licenses for special claims pro-

visionally granted, see *Cutten v. Howell, Ross v. Cutten*, 16 N.Z.L.R. (S.C.) 373 (1898) ; as to rent due in respect of special claims, see *Cuff v. Jordan*, 16 N.Z.L.R. 117 (1897) ; *Norbury v. Jordan*, 16 N.Z.L.R. (S.C.) 179 (1897).

CHAPTER III.

THE MEANS BY WHICH INTERESTS IN CLAIMS MAY BE ACQUIRED.

SEC. I.—BY MARKING OUT.

- (a) Manner of Marking Out.
- (b) Priority of Marking Out.
- (c) Marking out ground the subject of an Application for Lease.

SEC. II.—BY ADJUDICATION OF THE WARDEN.

SEC. III.—APPLICATION FOR CLAIMS.

SEC. IV.—REGISTRATION OF CLAIMS.

SEC. V.—PROTECTION REGISTRATION.

SECTION I.—BY MARKING OUT.

THE various mining boards have power to make by-laws, ^{Bk. I, Ch. III, Sec. I.} to be in force in their respective districts, for prescribing ^{By-laws.} the manner in which claims shall be taken possession of (a), and marking out or pegging has by all the by-laws been made the first proceeding to be taken by anyone desirous of acquiring a claim (b).

As before stated (c), possession in conformity with the ^{Title by possession.} by-laws is sufficient to give the holder of a miner's right a title to the claim marked out and taken up by him, and to

(a) Act No. 1120, sec. 106 (iv).
(b) *Hutcheson v. Erk*, 3 V.L.R.
(M.) 1 (1877); and see 62 Vic. No.

38 (N.Z.), sec. 79.
(c) *Ante*, Chap. II, "GOLD MINING CLAIMS."

Bk. I, Ch. III.
Sec. I.

all gold found in or upon that claim (*d*), but it is absolutely necessary in taking possession of a claim that the requirements of the by-laws be complied with, otherwise the holder will be in illegal occupation of his claim. And the by-laws will always be construed strictly (*e*), and according to the rules which courts of justice have applied to the construction of Acts of Parliament (*f*).

Basis of title.

The basis of title to a claim is possession (*g*), and the first act of possession, either with respect to virgin ground or to land which has been abandoned *de facto*, is the marking out in conformity with the by-laws. "The title to mine on the Crown Lands of Victoria," says Molesworth, Chief Judge, "from their being first let open to miners has been based on possession, the first person taking such possession under restrictions imposed being held to have the best right" (*h*);

First marking.

and persons first marking off a claim which has been actually abandoned, and applying for registration, are entitled in preference to all others, even to one who afterwards obtained a declaration by the Warden of forfeiture by the original holders (*i*). Under the regulations made in pursuance of the Act 30 Vic. No. 8 of New South Wales, it was held that possession must be taken and the marking out must be done personally by the intending owners, and could not be done by an agent (*j*).

Illegal occupation.

Non-compliance with the by-laws, however, in the taking up of a claim will not make such taking up void, but only voidable, and an adjudication of possession by the Warden is necessary to give title as against a person taking up a claim irregularly and being in unlawful occupation of it (*k*).

(*d*) *McGill v. Tatham*, 2 W.W. & A'B. (L.) 52 (1865); *Scottish & Cornish G.M. Co. v. Great Gulf G.M. Co.*, 2 W.W. & A'B. (L.) 103 (1865).

(*e*) *Beavan v. Righy*, 2 V.L.R. (M.) 7 (1876).

(*f*) *Lavelor v. Stiggants*, 2 V.L.R. (M.) 17 (1876).

(*g*) *Moore v. White*, 4 A.J.R. 17

(1873).

(*h*) *Warrior G.M. Co. v. Cotter*, 3 W.W. & A'B. (M.) 81 (1866).

(*i*) *Keast v. D'Angri*, 4 A.J.R. 61 (1873).

(*j*) *Ex parte McInnes*, 9 N.S.W. S.C.R. (L.) 28 (1870).

(*k*) *Greenhill v. Braidley*, 4 V.L.R. (M.) 5 (1878).

It was held by the Queensland Courts that if a holder of a miner's right marked off and took possession of more ground than he was entitled to (*l*), the surplus might be pegged out by any holder of a miner's right (*m*). In Victoria the doctrine of *Critchley v. Graham* applies.

*Bk. I. Ch. III.
Sec. I.*
Marking excess
ground.

(a) Manner of Marking Out.

The mode of marking out a claim is defined by the by-laws (*a*), and the universal method adopted is of inserting posts or pegs at the corners or angles of the claim, or on the approximate base line of a reef, or both, before applying for registration.

Defined by
by-laws.

If a by-law prescribes the mode of taking up claims, and requires a claim to be marked out by erecting posts at the corners or angles, the claim cannot be legally taken possession of in any other manner than that prescribed by the by-law. Where a by-law (*b*) provided that claims should be taken possession of by erecting a post at each corner of the claim, such post to be not less than three inches in diameter, and to be fixed firmly in the ground, extending at least three feet above it, it was held that the by-law was reasonable under section 111 of the Act No. 32 (*c*), and where a miner had taken possession of a claim under this by-law by erecting two posts at one boundary, blazing a tree at another, and adopting the stump of a tree as a post at another, it was held that the marking out was bad, and that the non-compliance with the by-law avoided the effect of taking possession, and that a claim could be lawfully taken possession of only by erecting posts in the places and of the dimensions and height mentioned in the by-law, and that the defendant failing to comply with the by-law was not

Inserting corner
pegs.

(*l*) Reg. 9 under 38 Vic. No. 11 (Q).

(*m*) *Sievers v. McAuly*, 1 Q.L.J. App. 54 (1879); and see *Howell v. Ross*, 16 N.Z.L.R. (S.C.) 684 (1898); see also *Barlow v. Hayes*, 4 W.W. & A'B. (M.) 67 (1867).

(*a*) It is defined by the Act in New Zealand; see 62 Vic. No. 38 (N.Z.), sec. 79.

(*b*) Beechworth By-law, No. X, sec. ii.

(*c*) Compare Act No. 1120, secs. 3, 106 (iv).

Bk. I. Ch. III. Sec. I. entitled to occupy for mining purposes the land held by him (*d*).

Fixing pegs on highway.

Where a by-law requires pegs to be fixed at the corners or angles of a claim, and two of such corners are on a highway, the fixing of the pegs on the highway may be an illegal act so far as encroaching on the highway is concerned, yet as regards the claim the applicant can effectually take it up by so marking it out (*e*); and where a miner taking up a claim (*f*) found that he could not peg it out in conformity with the by-laws without trespassing on private property, it was held that as he had not fixed his pegs on the private property he acquired no title to the claim under the by-law, though the taking up was sufficient to enable him to be sued for being in illegal occupation (*g*).

Re-pegging.

Pegging out a claim afresh is an abandonment of title acquired by a previous marking out; a claimholder cannot hold under two titles, and it will be assumed that by a second marking he is not satisfied with the regularity of the first marking, and so voluntarily abandons it (*h*).

Marking after Warden's decision.

As marking and registration in accordance with the by-laws are a condition precedent to an applicant obtaining a title to a claim, a person obtaining a Warden's order putting him in possession of a forfeited or abandoned claim must mark out such claim forthwith in the same manner as he would be required to do upon taking up a new claim (*i*), unless the by-laws specially provide that such marking out is unnecessary (*j*). But in a late case it was held that where a claimholder allowed his miner's right to lapse, and

(*d*) *Thompson v. Land*, 3 W.W. & A.B. (M.) 13 (1866); and see *Pearce v. Greville*, 15 N.Z.L.R. (S.C.) 735 (1897).

(*e*) *Parade G.M. Co. v. Victoria United Co.*, 3 V.L.R. (E.) 24 (1877).

(*f*) *Castlemaine By-law*, No. III, cl. 10.

(*g*) *Talent v. Dibdin*, 8 V.L.R. (M.) 31; 3 A.L.T. 140; 4 A.L.T. 16 (1882).

(*h*) *Barker's G.M. Co. v. Keating*,

1 V.R. (M.) 18; 1 A.J.R. 55 (1870).

(*i*) *Moore v. White*, 4 A.J.R. 17 (1873); *Beavan v. Rigby*, 2 V.L.R. (M.) 7 (1876).

(*j*) *Barton v. Band of Hope and Albion Consols* (3), 6 V.L.R. (M.) 1; 1 A.L.T. 145 (1880); but see *Coates v. South Loch Fyne G.M. Co.* (2), 25 V.L.R. 543; 6 A.L.R. 62 (1900); and *post*, Ch. V, Sec. II, "FORFEITURE."

before proceedings obtained a fresh one, and retained possession of his claim, it was not necessary for him in order to validate his title to re-mark and register a machinery area as on a fresh application (*k*). Marking out a claim alleged to be forfeited cannot, however, be effected before the Warden's adjudication, as any entry on the claim for the purpose would constitute a trespass against the registered holder of the claim if the person so marking out proved to be wrong. Re-pegging is not necessary in the case of a person taking a transfer of a good title; any marking out in such a case would create a fresh title, and constitute an abandonment of the previous title transferred (*l*).

*Bk. I. Ch. III.
Sec. I.*

but not before.

Several persons taking up several claims of the dimensions to which they are jointly entitled, with a view to the subsequent amalgamation of such claims, may take possession effectively (*m*) by pegging and trenching the corners of the entire block, and not the separate single men's portions, and may then register the whole as an amalgamated claim (*n*). In this case the amalgamation was virtually effected before the pegging out, and the claims were not applied for and registered as separate claims, and so the decision is not in conflict with that in *Holt v. Pratt* (*o*), where a number of persons marked out the entire ground to which they were jointly entitled, as a single claim, and afterwards on this irregular marking registered their individual claims separately, and then registered them as an amalgamated claim without re-pegging. This marking out was bad as for the individual claims, and the title to the amalgamated claim thus acquired was held to be defective (*p*). Under the New South Wales regulations (*q*) one member of a party taking up an amalgamated claim could not act for the rest of them in pegging out such claim (*r*).

Pegging amalgamated claims.

(*k*) *Truswell v. Woods*, 24 V.L.R. 742; 5 A.L.R. 62; 20 A.L.T. 210 (1899).

(*l*) *Palmer v. Chisholm*, 5 A.J.R. 169 (1874); *Barker's G.M. Co. v. Keating*, *supra*.

(*m*) *Beechworth By-laws*, Nov. 19, 1867.

(*n*) *Lighthourne v. Stitt*, 1 A.J.R.

71 (1870).

(*o*) Ch. Ct. of Mines, Dec. 1, 1868; *Argus*, Dec. 2, 1868.

(*p*) See *ante*, Ch. II, Sec. VI, "AMALGAMATION OF CLAIMS."

(*q*) Regs. under 30 Vic. No. 8 (N.S.W.) cl. 14.

(*r*) *Ex parte McInnes*, 9 N.S.W. S.C.R. (L.) 28 (1870).

*Bk. I. Ch. III.
Sec. I.*

Re-pegging part
of claim.

On a re-pegging the whole claim must be marked out afresh. Thus, a by-law (s) required a claim to be taken up by fixing four pegs, one at each corner. The defendants marked out an alluvial claim which exceeded the quantity to which they were entitled, but was otherwise regular as far as pegging out was concerned; but they had no miners' rights at the time they so marked out. Subsequently, having obtained miners' rights, they again marked out their claim, not by fixing four pegs as required by the by-law, but by retaining two of the original pegs and by altering the other two. The Chief Judge held that this was not a good marking out, inasmuch as the alteration of one boundary of their ground was not a constructive taking possession of a claim under their miners' rights (t).

Onus of proof.

The onus of proving that ground has been properly marked out in the manner prescribed by the by-laws always rests with the person defending his title (u).

(b) Priority of Marking Out.

First marking
takes priority.

It is an established principle that the person who first marks out a claim is entitled to it in preference to all others (a). But a person marking out ground in the occupation of another, or ground that has been constructively abandoned, and not abandoned *de facto*, has no priority over the original holder until he has obtained an adjudication of the Warden in his favor (b); and a third person cannot take up as a claim land which is the subject of a complaint before the Warden pending the answer of the Chief Judge (c) on a special case (d), or pending an application for a mining lease of the same ground (e), or pending an application for

(s) Maryborough By-law, No. 68, Dec. 16, 1868.

(t) *Barrington v. Willox*, 4 V.L.R. (M.) 1 (1878).

(u) *Palmer v. Chisholm*, 5 A.J.R. 169 (1874).

(a) *Keast v. D'Angri*, 4 A.J.R. 61 (1873); *Truswell v. Powning*, 1 V.R. (M.) 13; 1 A.J.R. 18 (1870).

(b) *Critchley v. Graham* (2), 2 W.

& W. (L.) 211 (1863).

(c) The jurisdiction of the Chief Judge is now vested in the Supreme Court; see *post*, Bk. IV, Ch. III, "THE APPELLATE MINING COURT."

(d) *Harwood v. Beavan*, 2 V.L.R. (M.) 13 (1876).

(e) *Weddell v. Howse* (2), 9 V.L.R. (M.) 13; 4 A.L.T. 179 (1883); and see Act No. 1120, secs. 70, 71.

renewal of a lease (*f*), on the principle that the inchoate title of the holder should not be defeated by a stranger during that time. *Bk. I. Ch. III. Sec. I.*

The effect of priority in marking out as giving priority of title is fully demonstrated in the case of *Truswell v. Powning* (*g*). In that case Millett, representing the Temperance Co., was the holder of a claim at Little Bendigo, near Ballarat, and Powning issued a Warden's summons, returnable at 10 a.m. on November 1, against Millett, seeking to be put in possession of certain land held by Millett in excess of that allowed by the by-laws. On the day on which the summons was returnable (Nov. 1) Truswell, without the consent of Millett, marked out the land in question as a claim at 2.30 o'clock in the morning, and at ten o'clock of the same day registered his claim with the mining registrar. On the same day, at 11 a.m., the Warden made an order for possession as against Millett in favor of Powning. Powning, however, abandoned the order thus obtained from the Warden, as such order enured to him only as against Millett and not as against others, and at 11.30 a.m. he, with the consent of the Temperance Co. (as represented by Millett), marked out a claim on the disputed land and obtained possession, not as under the Warden's order, nor as a transfer from Millett, but as an entirely new taking up. Truswell, who had pegged out the land earlier in the morning, and who had registered himself for the claim, summoned Powning before the Warden for trespass, and for an order for his removal from the land. On special case stated, it was held that Truswell being the first to mark out the ground was entitled to succeed as against Powning; that Powning by re-pegging had abandoned his previous title obtained from the Warden, and had committed a trespass as against Truswell by entering on and marking out the claim; and that he could not set up the title of Millett (the Temperance Co.), or his own possession with the

(*f*) Act No. 1514, sec. 49.
(*g*) 1 V.R. (M.) 13; 1 A.J.R. 18

(1870); see *Hunter v. Aratraveldt*,
3 W.W. & A'B. (M.) 59 (1866).

Bk. I. Ch. III. sec. 1. consent of the company, as a title by way of possession as against Truswell. *In re Drummond ex parte Dunbar (h)*, *Hunter v. Aratraveldt (i)*, and *Flinn v. Kilgour (j)* are quoted in the judgment.

Re-marking an abandonment of previous marking.

As shown by the judgment in *Truswell v. Powning* the person first properly marking out has priority of title. It sometimes happens, however, that a claimholder deeming his title unsound re-marks and re-registers his claim, without regard to the effect of such a proceeding. A claim may be lost by excess of caution. Thus, Clarke on April 28, 1868, pegged out and registered under the Beechworth By-laws an ordinary quartz claim. On May 18, and again on May 26 he registered a quartz tunnelling claim, the boundaries of which included the quartz claim originally marked out by him. There was no provision in the by-laws for taking up and registering a quartz tunnelling claim, *eo nomine*. On discovery of this, and deeming his title insecure, Clarke re-pegged the original quartz claim on Sept. 9, but failed to follow up his pegging by registration. On Sept. 25 Clarke applied for a lease of the whole ground, and on November 5 O'Sullivan summoned Clarke before the Warden, seeking a declaration of forfeiture and an order for possession of the claim. On special case, the Chief Judge held that each successive registration by Clarke constituted an abandonment of his previous title; that the re-pegging of his original claim on Sept. 9, not having been followed by registration, did not redeem or revive his title to the claim; and that his application for a lease afforded no protection to nor alteration in any previous title (*k*).

(c) Marking Out Ground the Subject of an Application for Lease.

Before the Act No. 446.

Before the passing of the Act 36 Vic. No. 446 (*a*) an

- (*h*) 2 W. & W. (L.) 280 (1863).
 (*i*) 3 W.W. & A'B. (M.) 59 (1866).
 (*j*) Ch. Ct. of Mines, June 15, 1868; 5 W.W. & A'B. (M.) 32.
 (*k*) *O'Sullivan v. Clarke*, Ch. Ct. of Mines, Dec. 1, 1868; *Argus*,

- Dec. 2, 1868; and see *Brooks v. Jeffery*, 15 N.Z.L.R. (S.C.) 727 (1897); *Parker v. Brooks*, 16 N.Z.L.R. (C.A.) 276 (1897).
 (*a*) On Dec. 17, 1872; consolidated in Act No. 1120, Part I.

application for a lease did not prevent any person taking up the ground applied for as a claim under miner's right, though in the event of the lease being granted the lessee could proceed for encroachment and for restitution of the gold taken out of the leased land (*b*). But under section 70 of the Act No. 1120 (which is a re-enactment of section 3 of the Act No. 446) "pending the application for a lease it shall not be lawful to mark out as a claim, or to include within the boundaries of any claim, the land applied for, or any part thereof, and no such marking out shall confer any right or title to the said land" (*c*); and the same law applies pending an application for renewal of a lease (*d*). Under the New South Wales regulations (*e*) a holder of a miner's right can take up a quartz claim on land in respect of which an application for a gold mining lease is pending; if the lease is refused, his position is good against a subsequent applicant (*f*). And under *The Goldfields Act 1895 Amendment Act 1898* of Western Australia (*g*) an alluvial claim may be taken up by the holder of a miner's right pending the granting of a lease of the land (*h*).

*Bk. I. Ch. 111.
Sec. 1.*

However, the termination of a leasehold title terminates the interest under it, and land formerly held under a lease which has expired by effluxion of time may be marked out and applied for as a claim without the necessity of an adjudication by the Warden (*i*); and possession of ground may be similarly taken after the Crown has recovered possession and declared a lease void (*j*); or in cases where a default has been made in the application (*k*); but possession may not be so taken of land the lease of which is merely

Expiration of
lease.

Lease declared
void.

(*b*) *Barker's G.M. Co. v. Keating*, 1 V.R. (M.) 18; 1 A.J.R. 55 (1870); and see *Hutcheson v. Erk*, 3 V.L.R. (M.) 1 (1877); *Constable v. Pigtail Q.M. Co.*, 3 V.L.R. (M.) 7 (1877).

(*c*) See *post*, Bk. II, Ch. II, "APPLICATION FOR GOLD MINING LEASES."

(*d*) Act No. 1514, sec. 49.

(*e*) 37 Vic. No. 13 (N.S.W.) sec. 40, reg. 28, framed from section 3 of the Victorian Act No. 446 (No. 1120, sec. 70).

(*f*) *Frazer v. Hartley*, 7 W.N. (N.S.W.) 101 (1891).

(*g*) 62 Vic. No. 16 (W.A.), sec. 10; regs. Div 1, cl. 2, 103.

(*h*) *Scott v. Payne*, 1 W.A.L.R. (F.C.) 129 (1899).

(*i*) *Durant v. Jackson*, 1 V.L.R. (M.) 6 (1875).

(*j*) *Barwick v. Duchess of Edinburgh Co.*, 8 V.L.R. (E.) 70; 3 A.L.T. 68, 121 (1882).

(*k*) *Antony v. Dillon*, 15 V.L.R. 240; 10 A.L.T. 231 (1889).

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Default in
application.

Expiration of
lease.

alleged to be void (*l*); nor can land be legally marked out for a claim prior to the expiry of a lease in anticipation of the expiration of the term (*m*); though marking out a claim on the evening of the day on which the *Gazette* notice of the forfeiture of a lease of the land marked out is published, is a good marking out (*n*).

Bain v. McColl.

In the case of *Bain v. McColl* (*o*), which was decided under the Act No. 291, it was held that section 37 of that Act (No. 1120, sec. 65), explaining section 24 (49), made leases valid as against persons taking up claims after the application for and before the granting of leases, but that it made them valid against such persons only when the application for the lease was made in accordance with the leasing regulations (*p*). A case of this nature was, however, met by the provisions of the Act No. 446, passed subsequently to the decision in *Bain v. McColl*, protecting land during an application for lease (*q*).

Proceeding
before Warden.

Though the holder of a miner's right has no means of acquiring a claim pending an application for a lease, he might during that period proceed before the Warden to be put in possession of the land subject to the fate of the application for the lease (*r*); and taking possession of a claim by marking out is good as against a person subsequently marking out the ground as for a lease, even though the registration of the claim is effected subsequently to the marking out for the lease (*s*).

Marking pre-
vious to appli-
cation.

Title as against
persons pre-
viously marking
for lease.

Under the Act No. 1120, secs. 49, 65 (corresponding with Act No. 291, secs. 24, 37), marking out for a lease did not, as already shown, stop the power of acquiring title to a claim

(*l*) *Whitely v. Schlemm*, 3 V.L.R. (M.) 58; 4 A.L.T. 115 (1882).

(*m*) *Cooper v. White*, 4 V.L.R. (M.) 10 (1878).

(*n*) *Weddell v. Howse* (1), 8 V.L.R. (M.) 44; 4 A.L.T. 95 (1882).

(*o*) 4 A.J.R. 62 (1873).

(*p*) *Munro v. Sutherland* (2), 5 A.J.R. 75, 139 (1874).

(*q*) Act No. 446, sec. 3; re-enacted by Act No. 1120, sec. 70.

(*r*) *Hutcheson v. Erk*, 3 V.L.R. (M.) 1 (1877); see, however, *Cock v.*

Stavell Amalgamated Scotchman's and Cross Reef's G.M. Co., 24 V.L.R. 165; 4 A.L.R. 219; 20 A.L.T. 85 (1898); and *post*, Bk. II, Ch. III, "FORFEITURE OF GOLD MINING LEASES."

(*s*) *Greenhill v. Braidley*, 4 V.L.R. (M.) 5 (1878).

by marking, except as to the rights of those previously marking for a lease (*t*), but the provisions of the Act No. 446, subsequently passed (*u*), meet the case, and make the marking for a claim pending an application for a lease ineffectual for all purposes (*v*); though where land was marked out for a lease by A, whose application was subsequently refused, and pending the application B marked it out as a claim, it was held that a stranger could take advantage of the irregularity under the Act No. 446, though B could not acquire title (*w*). *Bk. I. Ch. III. Sec. I.*

This subject will be more fully discussed in a subsequent portion of this work (*x*), and the right of holders of miners' rights to acquire title to land the subject of a lease, or of an application for a lease, will be considered more at length, with a view to explaining the construction and effect of the before-mentioned protecting clauses of the Act No. 1120. Right to acquire title.

SECTION II.—BY ADJUDICATION OF THE WARDEN.

It has already been shown that on the principle established by *Critchley v. Graham*, before a miner can avail himself of a forfeiture or a constructive abandonment of a claim in the actual possession of another miner he must first obtain from the Warden a declaration of forfeiture or abandonment, and an order to be put in possession. This principle has been echoed by all the by-laws, and has been enacted by *The Mining Act 1898* of New Zealand (*a*); it does not, however, extend to cases of intentional or *de facto* abandonment (*b*). When necessary.

The Warden has jurisdiction to order possession of a claim to be given to any holder of a miner's right if the Jurisdiction of Warden.

(*t*) *Barker's G. M. Co. v. Keating*, 1 V.R. (M.) 18; 1 A.J.R. 55 (1870).

(*u*) Consolidated, Act No. 1120, sec. 70.

(*v*) *Weddell v. Howse* (2), 9 V.L.R. (M.) 13; 4 A.L.T. 179

(1883).

(*w*) *Ibid.*

(*x*) See *post*, Bk. II, "INTERESTS IN GOLD MINING LEASES."

(*a*) 62 Vic. No. 38 (N.Z.), sec. 147.

(*b*) *Mulcahy v. Walthalla Co.*, 5 W.W. & A'B. (E.) 103 (1867).

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claim has been constructively abandoned (*c*), or forfeited for non-compliance with the by-laws (*d*), or if the defendant is in illegal occupation of it (*e*); and in a complaint before the Warden for recovery of possession of a claim, if the complainant succeeds, the Warden is bound to put him in possession (*f*).

Effect of
Warden's order.

But the Warden's order of forfeiture alone is not sufficient to give the complainant a title; the order of forfeiture merely clears away the old titles, and authorizes possession by the complainant under his miner's right. Persons obtaining a Warden's order must therefore mark out the claim as upon taking up new ground, and they are not necessarily entitled to take up the whole of the ground forfeited unless they have sufficient miners' rights (*g*). The correctness of the law as above stated was, however, questioned in *Coates v. South Loch Fyne G.M. Co.* (*h*), though the principle was not reversed. "Accepting the principle of *Sayers v. Jacomb*, *Moore v. White*, and *Beavan v. Rigby* as established," says Holroyd, J., "it would not, according to the authorities, afford a defence to the right of a successful applicant for forfeiture to be put in possession or to mark out first."

Marking out
after Warden's
order.

*Coates v. South
Loch Fyne G.M.
Co.*

A successful applicant for the forfeiture of a machinery area (*i*) which has been registered, and who is put in possession by the Warden, need not mark out the ground afresh as on a new taking up in order to complete his title; he succeeds to the forfeited area as a machinery site, and the order to put him in possession should be part of the Warden's decision (*j*). If the applicant does not assert his right to be put in possession, the declaration of forfeiture leaves the claim or area open to be marked out afresh for

(*c*) *Warrior G.M. Co. v. Cotter*, 3 W.W. & A'B. (M.) 81 (1866); *Collins v. O'Dwyer*, 5 W.W. & A'B. (M.) 30 (1868).

(*d*) *Clerk v. Wrigley*, 4 W.W. & A'B. (M.) 74 (1867); *Oxley v. Little*, 5 W.W. & A'B. (M.) 14 (1868).

(*e*) *Barlow v. Hayes*, 4 W.W. & A'B. (M.) 67 (1867); *Lennox v. Golden Fleece and Heales Co.*, 5

A.J.R. 18 (1874).

(*f*) Act No. 1120, sec. 237.

(*g*) *Moore v. White*, 4 A.J.R. 17 (1873); *Beavan v. Rigby*, 2 V.L.R. (M.) 7 (1876); *Sayers v. Jacomb*, 3 V.R. (L.) 132; 3 A.J.R. 66 (1877).

(*h*) 25 V.L.R. 543; 6 A.L.R. 62; 21 A.L.T. 223 (1900).

(*i*) Gippsland By-law, No. 40.

(*j*) Act No. 1120, sec. 237.

machinery or other mining purposes as if it were abandoned ground. And *quære* whether the original posts which marked out the site before registration ought to be maintained, restored, or replaced by others (*k*). Bk. I. Ch. III.
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But where the by-laws provide that marking out subsequent to the adjudication is not necessary, it need not be done (*l*), though in ordinary cases marking and registration on the adjudication of possession by the Warden are necessary to give priority of title (*m*). By-laws.

Marking out a claim is not a necessary preliminary to proceeding before the Warden for forfeiture and possession (*n*). There must be some legal means to enable a complainant to enforce the right of all miners, and requiring him to make a preliminary marking out of the claim of which he sought possession would be requiring a preliminary which would be a trespass upon possession if he proved wrong (*o*). Marking out
before Warden's
order.

A collusive recovery of land before the Warden will not give a valid title, and even a large expenditure on a claim by holders previous to forfeiture will not entitle persons collusively recovering the land to protection against forfeiture without notice (*p*). Collusive
recovery.

Under the Act No. 32 a by-law (*q*) was held *ultra vires* which directed that the value of defendant's material then on the ground should be paid for before a complainant could take possession, and it was further held that such by-law was not made valid by section 80 of the Act No. 291, preserving existing interests. But where under this by-law Jacomb took up a claim on January 16, 1865, and on February 27, 1872, Hartmann obtained an adjudication of forfeiture from the Warden, who directed possession to be Payment for
material.

(*k*) *Coates v. South Loch Fyne G.M. Co.* (2), 25 V.L.R. 543; 6 A.L.R. 62; 21 A.L.T. 223 (1900).

(*l*) *Barton v. Band of Hope and Albion Consols* (3), 6 V.L.R. (M.) 1; 1 A.L.T. 145 (1880).

(*m*) *Keast v. D'Angri*, 4 A.J.R. 61 (1873).

(*n*) *Kilgour v. Flinn*, 5 W.W. & A'B. (M.) 32 (1868).

(*o*) *Barlow v. Hayes*, 4 W.W. & A'B. (M.) 67 (1867).

(*p*) *Moore v. White*, 4 A.J.R. 17 (1873).

(*q*) Sandhurst By-law, No. VI, cl. 6.

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Sec. II.*

given to him on payment of the value of the defendant's material, and Hartmann took possession without paying the money, marked off the claim, and obtained registration of it, it was held that though the by-law was *ultra vires* Hartmann could not take possession of the ground without paying the money, until the bad part of the order requiring the money to be paid had been quashed (*r*).

SECTION III.—APPLICATION FOR CLAIMS.

Mining
Registrar.

Having marked out a claim as prescribed by the by-laws, the next step necessary is to make a formal application for the claim to the local mining registrar. Under all the by-laws a written or printed notice of the application is required to be posted on the ground for a specified time (*a*). A notice of the application is also required to be given to the mining registrar, who will then furnish a certificate of the application. The notice of application should give some description of the locality in which the land lies, and a notice of application for a claim (*b*) signed by one of the intending claimholders for himself and nineteen others was held to be bad, and to make the title to the claim bad (*c*).

Description of
locality.

Mistake as to
time,

In an application for registration of a claim a mistake as to the time of taking possession may be explained by evidence of the real facts. Thus, where an applicant made a mistake in his application by inserting "p.m." (*post meridiem*) in lieu of "a.m." (*ante meridiem*), it was held that such a mistake could not be taken advantage of by an applicant for a mining lease of the ground; though the Chief Judge doubted the effect of such a mistake as between holders of miners' rights both applying for a claim under the by-laws (*d*). And so, where a mistake was made in the

or as to area.

(*r*) *Sayers v. Jacomb*, 3 V.R. (L.) 132, 3 A.J.R. 66 (1877). As to the authority to make a by-law of this nature, compare Act No. 1120, sec. 106 (ix).

(*a*) And see 62 Vic. No. 38 (N.Z.) sec. 136.

(*b*) Under the Sandhurst By-laws Sept. 16, 1866, cls. 59 to 66.

(*c*) *Cruise v. Crowley*, 5 W.W. & A'B. (M.) 27 (1868).

(*d*) *Greenhill v. Braidley*, 4 V.L. R. (M.) 5 (1878).

area taken up. Where a claim was properly marked out with an area of sixteen acres, but was described in the notice of application without fraud as twelve acres, and the survey under the by-laws showed the correct area to be sixteen acres, and the applicants had sufficient miners' rights to justify them in taking up that quantity of ground, it was held that they acquired a good title to the whole sixteen acres (*e*).

*Bk. I, Ch. III.
Sec. III.*

A verbal application to the mining-registrar to re-register an amalgamated claim under a by-law (*f*) which provided no form of application, made by the manager of an incorporated company, with the consent of the other parties interested, was held to be a valid application (*g*).

Verbal application.

SECTION IV.—REGISTRATION OF CLAIMS.

The Act No. 1120, Part I, does not of itself make marking out a condition precedent to acquiring title to a claim, that preliminary proceeding being prescribed by the by-laws; but it is otherwise with regard to registration of claims, and before availing himself of the privileges of section 8, it is necessary that a claimholder shall register his claim in pursuance of section 7. The mode of registration is defined by the by-laws (*a*).

Required by the Act.

Registration, however, is not necessary to complete a title as against trespassers; it is entirely optional, though a claimholder cannot divide his interest or assign or encumber his claim until it has been registered. And where a by-law (*b*) authorized the taking up of unregistered claims, it was held that marking out the claim without actual possession would enable the owner to maintain trespass, though he could not maintain ejectment (*c*).

When not necessary.

(*e*) *Cruise v. Crowley*, 5 W.W. & A'B. (M.) 27 (1868).

(S.A.), sec. 42; 37 Vic. No. 13 (N.S.W.), sec. 16.

(*f*) Ballarat By-law, No. XI, sec. 4.

(*b*) Castlemaine By-law No. V, sec. 1.

(*g*) *Donaldson v. Llanberis Co.*, 9 V.L.R. (M.) 21, 5 A.L.T. 54 (1883).

(*c*) *White v. Perriam*, 5 V.L.R. (M.) 31, 1 A.L.T. 95 (1879).

(*a*) Compare 56 & 57 Vic. No. 587

*Bk. I. Ch. III.
Sec. IV.*

Persons marking
for lease.

The question of registration of claims does not apply as between a person marking for a lease and a person marking for a claim, though it would apply as between persons marking for claims; a total omission to register would be immaterial as to the former parties. As between conflicting claimholders the material obligation of working an unregistered claim runs from the time of taking up, and for this purpose parts of a day are to be considered (*d*). "I have some difficulty," says Molesworth, Chief Judge, "as to whether registration in the name and within the time prescribed by the by-laws is a condition precedent to title. I would rather say that a defendant cannot set up a title not duly registered at the time of the trial" (*e*).

Time of
registration.

Title without
registration.

A possessory title without registration, even where permitted by the by-laws, though it may be good as against trespassers, must nevertheless be unsatisfactory. The holder of a claim under the Ballarat By-laws (*f*) means the registered holder, and persons not registered cannot avail themselves of the by-laws as to obtaining protection registration (*g*); and where registration is required, registration within the time prescribed by the by-laws is part and parcel of the title, as that is the time from which the obligation to work a registered claim begins (*h*).

Certificate of
registration.

The certificate of registration of a claim is granted by the mining registrar. It is not necessary that the certificate of registration should contain the name of a company which was only a partnership and not incorporated, in addition to the names of its members (*i*); and mere priority in point of number of a certificate of registration is not a priority in point of right (*j*); and it seems that a survey and plan are not necessary to complete the final registration of a claim, though where a by-law makes a survey and plan a con-

(*d*) *Greenhill v. Bradley*, 4 V.L.R. (M.) 5 (1878).

(*e*) *Moore v. White*, 4 A.J.R. 17 (1873).

(*f*) Under Ballarat By-law No. VIII, secs. 3, 4.

(*g*) *Thompson v. Begg*, 2 V.R.

(M.) 1; 2 A.J.R. 34 (1871).

(*h*) *Barker's G.M. Co. v. Keating*, 1 V.R. (M.) 18; 1 A.J.R. 55 (1870).

(*i*) *Cruise v. Crowley*, 5 W.W. & A'B. (M.) 27 (1868).

(*j*) *Ah Mon v. Bradfield*, 1 N.Z. J.R. (N.S.) M.L. 44 (1872).

dition precedent to registration, neglect to comply with the by-law in this respect will render the claim liable to forfeiture (*k*). If a survey is required, the surveyor cannot elect whether or not to make it; his duty is purely ministerial, and the Supreme Court will if necessary grant *mandamus* to compel him to make a survey (*l*).

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Sec. IV.*

A married woman may be registered as owner of a share in a claim, though not permitted to work in the mine (*m*). Married woman.

A delay in final registration (*n*) does not of itself defeat title, but only enables prior registration by others to defeat it (*o*); and where a claim was taken up under the Beechworth by-laws (*p*) by Oxley and others, who worked continuously from the taking up on the 9th of the month, and registered the claim on the 14th, omitting to register the claim within two days as required by the by-laws (*q*), the Chief Judge held that such omission did not avoid the taking possession by marking out. "Coupling *The Mining Statute* 1865, secs. 5, 6, 7, and 71 (xiii), (No. 1120, secs. 5, 7, 8, and 106 (xiii)), with the language of the by-law, I think the omission would only deprive Oxley and his partners of the powers of secs. 6 and 7 (7 and 8 of No. 1120) until registration, and subject them to a pecuniary penalty under section 237 (No. 1120, sec. 289)" (*r*). Delay in registration.

A claim cannot be registered unless the miner's right or miners' rights under which it is held be produced at the time to the mining registrar (*s*); and it is not necessary to appropriate a miner's right at the time of its issue to any specific ground (*t*). Miner's right to be produced.

(*k*) *Beavan v. Rigby*, 2 V.L.R. (M.) 7 (1876).

(*l*) *Reg. v. Stephenson, ex parte Black*, N.C. 22 (1869).

(*m*) *Rue v. Harris*, 3 N.S.W.L.R. (L.) 148 (1882); Act No. 1514, sec. 130.

(*n*) Ballarat By-law No. III, May 11, 1868.

(*o*) *Band of Hope and Albion Consols v. Young Band Extended Co.* (3), 9 V.L.R. (E.), 37; 4 A.L.T. 137 (1883).

(*p*) Beechworth By-law, No. VII, May 1, 1866.

(*q*) Beechworth By-law, No. IV, May 1, 1866.

(*r*) *Per* Molesworth, Ch. Judge, *Oxley v. Little*, 5 W.W. & A'B. (M.) 14 (1868).

(*s*) Act No. 1120, s. 7.

(*t*) *Fattorini v. Band and Albion Consols* (2), 9 V.L.R. (M.) 1; 4 A.L.T. 121. See *ante*, Chap. I, Sec. III, "TITLE UNDER MINER'S RIGHT."

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Sec. IV.

Books of mining
registrar.

The books of the mining registrar, or copies certified by him, are evidence of the registration of a claim (*u*), and are also evidence to show the existence of miners' rights in the persons taking up the claim as their qualification for taking it up, though such evidence would be insufficient to show their right to sue under the Act No. 1120, sec. 298. In the latter case the miners' rights must be produced (*v*).

Under Warden's
order.

When the Warden declares ground forfeited and orders possession to be given to a complainant, this alone does not excuse compliance with the by-laws; the complainant should mark out and register himself for the claim in the same manner as if it were virgin ground taken up by him under his miner's right. The Warden's order only decides that the land is open for selection. It declares that the ground has been forfeited by the defendant; it removes the existing interests, and the complainant then takes the land itself which is unoccupied, and occupies it by virtue of his miner's right, first marking, applying for, and registering it under the by-laws (*w*). But the declaration of forfeiture enures only to the complainant in whose favor it is made; it cannot be taken advantage of by third parties (*x*). Where, however, a by-law prescribes registration forthwith after adjudication of possession by the Warden, marking out is not necessary. If the holder of a claim, which had been registered without marking under an order of forfeiture, encroached upon the claim of another person, neglect to mark out might be a cloud upon his title, but could not defeat it (*y*).

Re-marking.

Re-marking without registration has no effect on the title (*z*). This will not amount to abandonment of previous title within the meaning of *Barker's G.M. Co. v. Keating* (*a*),

(*u*) Act No. 1120, sec. 83.

(*v*) *Cruise v. Crowley*, 5 W.W. & A.B. (M.) 27 (1868).

(*w*) *Sayers v. Jacomb*, 3 V.R. (L.) 132; 3 A.J.R. 66 (1872); *Moore v. White*, 4 A.J.R. 17 (1873); *Beavan v. Rigby*, 2 V.L.R. (M.) 7 (1876); discussed and disapproved of in *Coates v. South Loch Fyne G.M. Co.* (2), 25 V.L.R. 543; 6 A.L.R. 62;

21 A.L.T. 223 (1900).

(*x*) *Critchley v. Graham* (2), 2 W. & W. (L.) 211 (1863).

(*y*) *Barton v. Band of Hope and Albion Consols* (3), 6 V.L.R. (M.) 1; 1 A.L.T. 145 (1880).

(*z*) *Seal v. Bebro*, 5 V.L.R. (M.) 4; 1 A.L.T. 47 (1879).

(*a*) 1 V.R. (M.) 18; 1 A.J.R. 55 (1870).

as it is a nullity ; registration being a subsequent proceeding and a completion of title after marking out, a person re-marking only and not re-registering does not thereby abandon his registration already effected. Bk. I. Ch. III.
Sec. IV.

But if a claimholder re-registers his claim, either with or without re-marking, such registration will be an abandonment of his previous title (*b*) ; and where an amalgamated claim had been registered (*c*) it was held (over-ruling *The Parade G.M. Co. v. Victoria United Co.* (*d*), which was a decision given on an interlocutory application for injunction), that the previous separate titles to the claims could not be relied on (*e*) ; and under a by-law (*f*) which provided that the width of a quartz claim should not exceed 750 feet, and also that adjoining claims might be amalgamated and re-registered as one claim, the registration of an amalgamated claim was held good, though the width of the claim as amalgamated and re-registered exceeded 750 feet (*g*). Re-registration.

A complainant cannot acquire title by an adjudication of the Warden against a person wrongly registered, at least so far as regards the legally registered owner. Where a mining registrar registered a person by mistake for a claim which was already registered in the name of a third party, an adjudication of forfeiture and possession against the second registered owner, who was illegally registered, is of no avail as against the first and correctly registered owner (*h*). Incorrect registration.

In Queensland, where claims are registered with the Warden, it was not the duty of the Warden acting ministerially to register a claim for a greater area than that allowed Registration by Warden (Q.).

(*b*) *O'Sullivan v. Clarke*, Ch. Ct. of Mines, Dec. 1, 1868, *Argus*, Dec. 2, 1868.

(*c*) Ballarat By-law, No. XI, sec. 4.

(*d*) 3 V.L.R. (E.) 24 (1877). In this case it was held that re-registration of an amalgamated claim was not an abandonment of previous title, but that in the event of any irregularity in the registration of the amalgamated claims the parties could fall back on their

original titles.

(*e*) *Donaldson v. Llanberis Co.*, 9 V.L.R. (M.) 21 ; 5 A.L.T. 54 (1883) ; *United Extended Band of Hope Co. v. Tennant*, 3 W.W. & A'B. (M.) 41 (1886).

(*f*) Ballarat By-law, No. XI, sec. 4.

(*g*) *Donaldson v. Llanberis Co.*, *supra*.

(*h*) *Hunter v. Aratraveldt*, 3 W. & A'B. (M.) 59.

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Sec. IV.*

by the regulations, and if acting judicially it would be his duty to refuse to register such claim (*i*).

*Beavan v.
Rigby.*

Neither can a person failing to comply with the by-laws, and thus rendering his claim liable to forfeiture, revive or redeem his title by falling back on the fact of due compliance with the by-laws by a former registered owner. Thus, in 1874 Higgs and party were duly registered for a claim in compliance with the by-laws. In March 1875, Hartley applied to the Warden to be put in possession of the claim on the ground of forfeiture, and obtained an adjudication in his favor. In May, 1875, Hartley registered himself as owner of the claim by independent registration without obtaining the cancellation of the registration of Higgs and party, but neglected to comply with the provisions of the by-laws (*j*) requiring a survey and plan, with which provision Higgs and party had complied. In December, 1875, Hartley transferred to Rigby, who obtained registration as transferee of Hartley, but did not comply with the by-laws by obtaining a survey and plan. On an application by Beavan for the forfeiture of the claim on the ground of such non-compliance it was held that Rigby could not avail himself of the acts of the antecedent registered owners (Higgs and party), who had obtained a survey and plan, and that the plan provided and used by Higgs and party on their registration could not be applied by Rigby to the claim which Hartley had registered afresh without reference to Higgs's registration (*k*).

SECTION V.—PROTECTION REGISTRATION.

Suspension of
work.

The equity of allowing suspension of work on a claim for reasonable cause shown is recognised by all the by-laws and by the Acts and regulations of the other States. Protection registration is created entirely by the by-laws, and is granted

(*i*) *Reg. v. Cribb*, 2 Q.L.J. 157 (1886).

(*j*) Sandhurst By-law, No. X,

sec. 4, cl. 5, June 27, 1873.

(*k*) *Beavan v. Rigby*, 2 V.L.R. (M.) 7 (1876).

as of course on application to the mining registrar under certain conditions named in the by-laws, such as inability to work owing to flooding of the mine, the necessity of suspending work during the erection of machinery, or while preliminary arrangements are being made to form a company.

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Sec. V.*

A certificate of protection registration granted on a verbal application (*a*) was held to be ineffectual as an excuse for not working a claim, where by the by-laws the application was required to be in writing (*b*). It may be doubted whether a written application is intended for the assistance and protection of the registrar, and which he therefore might dispense with, or for the protection of the interests of the mining public. There may be purposes for which writing would afford material evidence against the applicant, and if the application were not in writing persons enquiring might find no means in the registrar's office of ascertaining the ground on which it was sought, or its truth or falsehood, or its date; it is a matter of public importance, and should be obligatory (*c*).

Application for certificate.

Under the Beechworth By-laws (*d*) suspension orders or certificates of protection registration are in the discretion of the mining registrar, and if he grant the order it is to be presumed that he had ascertained the facts set up in support of the application, and had satisfied himself as to them; and where a suspension order is lawfully granted by the mining registrar, other persons cannot come in during the currency of the order, and obtain forfeiture of the claim (*e*).

Discretion in granting.

Some of the by-laws require a declaration to be made by the applicant showing the grounds on which protection registration should be granted, but whether the statement or declaration of the cause of suspension be written or verbal, it must be true, for the efficacy of protection regis-

Declaration.

(*a*) Under Maryborough By-law, No. 76, Sept. 17, 1866.

(*b*) As to procedure in New Zealand, see 62 Vic. No. 38 (N.Z.), sec. 130, *et seq.*

(*c*) *Brabender v. Gibbs*, 6 W.W. & A'B. (M.) 62; N.C. 71 (1869);

see *Donaldson v. Llanberis Co.*, 9 V.L.R. (M.) 21; 5 A.L.T. 54 (1883).

(*d*) Beechworth By-law, No. 41 (3).

(*e*) *McGrath v. Wilson*, 19 A.L.T. 251 (1898).

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tration depends on the truth and sufficiency of the declaration on which it is obtained (*f*); and where protection registration as an excuse for non-working has been obtained by a false declaration (*ff*) the claim is liable to forfeiture (*g*).

Saving
forfeiture.

A certificate of protection registration of a claim which is liable to forfeiture will not save the forfeiture previously incurred (*h*); neither will it amount to constructive working of the claim (*i*) so as to redeem a title forfeited by a previous non-fulfilment of requirements as to employment of labor (*j*).

Repeal of
by-law.

Protection registration is held under the by-law under which it is taken, notwithstanding the subsequent repeal of such by-law (*k*). It is granted by the mining registrar to the holder of a claim properly applying for it; and a holder of a claim seeking protection registration (*l*) was held to mean the registered holder; persons not registered could not avail themselves of the by-law and obtain protection registration (*m*).

Signature of
mining
registrar.

A certificate of protection registration must be signed by the mining registrar, or, if the by-laws permit of it, by his assistant; but the assistant must sign by his own name as assistant, not merely doing business for himself and then signing the name of the mining registrar. A certificate of protection registration signed "Harrie Wood *per* D. Christie, Mining Registrar," was held to be bad (*n*).

Reasons for
applying.

The reasons for applying for protection registration must not merely be true, but must clearly show why the protection registration is sought. Under a by-law (*o*)

(*f*) *Thompson v. Begg*, 2 V.R. (M.) 1; 2 A.J.R. 34 (1871).

(*ff*) Ballarat By-law, No. XI, *Gazette* Oct. 23, 1873.

(*g*) *Seal v. Bebro*, 5 V.L.R. (M.) 4; 1 A.L.T. 47 (1879).

(*h*) *Butler v. O'Keefe*, 3 W.W. & A'B. (M.) 16 (1866).

(*i*) Gippsland By-laws, March 9, 1883, Nos. 7, 12.

(*j*) *Hunter v. McNulty*, 13 V.L.R.

416; 9 A.L.T. 33 (1887).

(*k*) *Bond v. Watson*, 4 W.W. & A'B. (M.) 85 (1867).

(*l*) Ballarat By-law, No. VIII, sec. 3.

(*m*) *Thompson v. Begg*, 2 V.R. (M.) 1; 2 A.J.R. 34 (1871).

(*n*) *Thompson v. Begg*, *supra*.

(*o*) Gippsland By-laws, March 9, 1883, Nos. 7, 12.

allowing suspension of work on the ground of "breakage of machinery, or any other sufficient cause to be settled by the Warden" no protection is afforded by a suspension certificate granted on the ground of "want of machinery to crush, &c.," where the evidence showed that the ground of application for protection registration referred to the stoppage of a public crushing machine at which the claimholder usually had his stone crushed. The by-law refers to machinery connected with the claim, and not to an independent public crushing machine (*p*).

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And where a by-law (*q*) required work to be resumed within twenty-four hours after the expiration of the period of protection registration, otherwise forfeiture, and the registered holder of a claim was prevented from resuming work in consequence of his claim being flooded, and it could not be drained except at a ruinous expense, it was held that notwithstanding this the by-law applied, and that a forfeiture of the claim had been incurred (*r*).

Resumption of work.

A certificate of protection registration wrongly obtained is not altogether void, but voidable, and a person obtaining a certificate of suspension for the purpose of forming a company, and failing to do so within the time required by the by-laws, can only be dispossessed by legal proceedings (*s*). "Courts are generally rigid as to construing by-laws imposing forfeitures, and for the same reason should be lax in construing provisions protecting from forfeitures; and I shall strain that principle almost to breaking" (*t*).

Certificate not void but voidable.

And where a by-law (*u*) prescribed a means of obtaining a certificate of protection registration for a term named in the certificate, and also provided for the revocation of the certificate by the Warden where it had been obtained by

Certificate obtained by false pretences.

(*p*) *Hunter v. McNulty*, 13 V.L.R. 416; 9 A.L.T. 33 (1887).

(*q*) Maryborough By-laws, Aug. 26, 1864, cl. 112, 116.

(*r*) *Duffy v. Tait*, 4 W.W. & A'B. (M.) 17 (1867).

(*s*) *Kilgour v. Flinn*, 5 W.W. &

A'B. (M.) 32 (1868).

(*t*) *Per* Molesworth, Ch. Judge, in *Weddell v. Howse* (1), 8 V.L.R. (M.) 44; 4 A.L.T. 95 (1882).

(*u*) Sandhurst By-law, No. VII, March 4, 1864.

Bk. I. Ch. III. Sec. V. false pretences, and it was admitted that the certificate was obtained by false pretences, it was held that the certificate was not void *ab initio*, but voidable only (*v*). So, a certificate obtained in contravention of the by-law (*w*).

Estoppel.

Where a company let their mine on tribute, and the tributers subsequently abandoned the agreement and the claim, after which the company obtained a certificate of protection registration for three months, and the holder of a miner's right proceeded against the company for forfeiture, but gave no notice of his intention to proceed as required by the by-laws (*x*), which required notice to be served before a forfeiture could be enforced, it was held that the certificate of protection registration obtained by the company would not operate by way of estoppel against its right to receive notice (*y*).

Neglect to post certificate.

The period allowed by a certificate protecting a claim from forfeiture for non-working, though limited by the by-laws, is in some degree a judicial act of the mining registrar, and the neglect of a claimholder to procure or post the certificate required by the by-laws (*z*) will not deprive him of the benefit of protection from forfeiture of his claim, though he may be liable to other penalties (*a*).

Compliance with conditions.

A person obtaining protection registration is bound to comply with the conditions under which it is granted, and a second certificate of suspension will not cure a forfeiture incurred during the existence of a prior certificate, the conditions of which have not been complied with (*b*).

Second certificate.

The by-laws generally forbid the granting of a second certificate of protection registration unless work shall have been resumed after the expiration of the period of the first certificate, and continued for a time limited by the by-laws,

(*v*) *Butler v. O'Keefe*, 3 W.W. & A.B. (M.) 16 (1866).

(*w*) *McGrath v. Wilson*, 19 A.L.T. 251 (1898).

(*x*) *Beechworth By-law*, No. 44, June 25, 1869.

(*y*) *O'Sullivan v. Mysterious Q.M. Co.*, 1 V.R. (M.) 4; 1 A.J.R. 13

(1870).

(*z*) *Maryborough By-laws*, July 2, 1869, Nos. 66, 67.

(*a*) *Weddell v. House* (1), 8 V.L.R. (M.) 44; 4 A.L.T. 95 (1882).

(*b*) *Tait v. Henderson*, Ch. Ct. of Mines, March 11, 1867; *Argus*, March 12, 1867.

as a continuous series of suspension certificates would lock up the claim indefinitely, and enable a claimholder to "shepherd" his claim without working it as long as he thought fit. A certificate of protection registration forms only a kind of *dies non*, and unless the by-laws permit of it, and specially provide for a limited time after its expiration for resumption of work, as in *Duffy v. Tait* (c), work must be resumed immediately on the expiration of the period of protection registration.

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Where a regulation provided that a claim on the death of its owner should be protected for the benefit of his personal representatives, it was held that letters of administration need not be registered as a transfer (d).

Death of
claimholder.

(c) 4 W.W. & A'B. (M.) 17.

(d) *Woodward v. Earle*, 2 N.Z.

J.R., 12; see 62 Vic. No. 38 (N.Z.),
sec. 131.

CHAPTER IV.

WRONGFUL INTERFERENCE WITH MINING INTERESTS.

SEC. I.—TRESPASS.

(a) What will Constitute Trespass.

(b) Who can Sue for Trespass.

(c) Suits for Trespass.

SEC. II.—ENCROACHMENT.

(a) What will Constitute Encroachment.

(b) Who can Sue for Encroachment.

(c) Suits for Encroachment.

(d) Damages for Encroachment.

(e) Orders of Inspection.

SEC. III.—INJUNCTION.

(a) Injunction Orders.

(b) Breach of Injunction Order.

SECTION I.—TRESPASS.

(a) What will Constitute Trespass.

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Sec. I.
Definition of
trespass.

ANY entry on a claim in the occupation or possession of another person is a trespass upon that claim, unless such entry can be justified. The question of actual damage is immaterial; a trespass is an injury in itself. In mining suits trespass is usually held to be constituted by a wrongful entry on or interference with a claim in the possession of another person for mining purposes, or any injury thereto causing damage; while encroachment, though itself a

species of trespass, is limited to the workings of a mine by trespassing beyond the boundaries (a). Bk. I. Ch. IV.
Sec. I.

As against a trespasser the law leans towards the person in possession, and a person in possession of a claim, whether the title to it be good or bad, is entitled to maintain trespass against a mere wrongdoer without color of title (b); and if a person takes possession wrongfully according to the doctrine of *Critchley v. Graham* (c) and holds possession quietly, it would be a great straining of that case to say that another would be warranted in trespassing upon him; in fact the peace preserving policy of *Critchley v. Graham* would be against the trespasser (d); and a person in possession of ground as a claim, although the claim may have been taken up under a by-law which is *ultra vires*, may maintain trespass and can only be disturbed in his possession by legal proceedings (e). Possession good
against a
wrongdoer.

It is no excuse for a trespasser to plead that the trespass was committed by his servants. Persons who contract by consent not to do a particular act are not afterwards allowed to do that act by their servants, and get the profit of it, and retain the profit of it, and at the same time escape their liability for the act by saying that they had given no express directions to their servants to do it (f). But a hired servant of a claimholder not acting under his orders will stand in the same position as regards a complaint against him for trespass as the claimholder would if he were a defendant (g); and where a person acting under the direction of another commits a trespass, and the owner brings an action of trespass against him which he defends under instructions from his principal and is beaten, the judgment does not operate as an estoppel against the principal (h). Trespass by
servants.

(a) See *post*, Sec. II, "ENCROACHMENT."

(b) *Osborne v. Elliott*, 6 W.W. & A'B. (M.) 49; N.C. 20 (1869).

(c) 2 W. & W. (L.) 211 (1863).

(d) *Durant v. Jackson*, 1 V.L.R. (M.) 6 (1870).

(e) *Boitrell v. Waverley Co.*, 2

V.R. (M.) 16; 2 A.J.R. 133 (1871).

(f) *Lane v. Hannah*, 1 W. & W. (E.) 66 (1862).

(g) *Small v. Dyer*, 5 W.W. & A'B. (M.) 1 (1868); *Reg. v. Davies*, 6 W.W. & A'B. (L.) 246; N.C. 7, 16, 24 (1869).

(h) *Park Co. v. South Hustler's*

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Trespass on
amalgamated
claims.

Where several claims have been amalgamated it does not necessarily follow that a trespass upon one of them is a trespass upon them all (*i*); and where two claims have been amalgamated, and the amalgamated claim has not been registered separately as such, though trespass be proved on the amalgamated claim, it must be shown on which of the separate claims the trespass was committed (*j*).

Unintentional
trespass.

Trespass upon claims is frequently committed unintentionally and without any desire to injure the claim trespassed upon, or to take gold from it. A trespasser who has a *bond fide* belief in his title, in an action brought by the true owner to recover the value of gold and quartz taken from the mine, is entitled to receive credit for the expense of hewing and hauling (*k*); and where a trespass or encroachment by a neighboring company has been unintentional and un concealed, the company encroaching is entitled to the cost of working the ground encroached upon (*l*).

Wilful trespass.

But a trespasser not in possession under any color of title, and not under any mistake as to facts, though misapprehending the law, will not be entitled to deduct the expenses of obtaining the gold (*m*); neither will wilful trespassers be allowed the cost of winning gold obtained by them (*n*); though a trespasser who raised quartz from his own land, and also from other land on which he was unwittingly trespassing, was held to be entitled to the expense of raising and crushing the quartz obtained from his own land (*o*). But in the same case, where the Master in Equity found an entire quantity of auriferous substances raised from plaintiff's and defendant's mines by defendant, who was a trespasser on

Doctrine
of *per*
confusionem.

Reserve Co. (2), 9 V.L.R. (M.) 4; 4 A.L.T. 135 (1883).

(*i*) *St. George and Band of Hope Co. v. Band of Hope and Albion Consols*, 2 V.R. (E.) 206; 2 A.J.R. 81 (1871).

(*j*) *United Claims Tribute Co. v. Taylor*, 8 V.L.R. (M.) 19; 3 A.L.T. 147 (1882).

(*k*) *Munro v. Sutherland* (2), 5 A.J.R. 75, 139 (1874).

(*l*) *St. George United Co. v. Albion*

Co., 4 W.W. & A'B. (M.) 88 (1867).

(*m*) *Parade G.M. Co. v. Royal Harry Q.M. Co.*, 2 V.L.R. (L.) 214 (1876).

(*n*) *Att-Gen. v. Lansell* (4), 9 V.L.R. (E.) 172; 5 A.L.T. 71 (1883); on appeal (5), 10 V.L.R. (E.) 84 (1884).

(*o*) *Att-Gen. v. Lansell* (5), 10 V.L.R. (E.) 84; 5 A.L.T. 185 (1884).

plaintiff's mine, and also how much thereof was raised from each, and the total yield of gold from such entire quantity, but there was no evidence to show how much gold was obtained from each, Molesworth, J., held that the plaintiffs were not entitled to claim the whole of the gold, but that it should be divided proportionately (*p*); yet this decision was reversed on appeal, and the plaintiffs were held entitled, on the doctrine of *per confusionem*, to the whole of the gold (*q*). Bk. I. Ch. IV.
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And where an order was made against a defendant company that they might continue to work on land the title of which was in dispute, on the terms of keeping an account of the gold obtained, and the defendants worked the land in conjunction with land to which they had a good title, and mixed the quartz from both before extracting the gold from it, and then paid into the bank a proportionate part of the gold obtained from the mixed quartz, it was held by the Full Court, reversing the decision of Molesworth, J. (*r*), that the defendant company had committed a distinct breach of the order, and they were ordered to pay into the bank the whole of the proceeds of the gold obtained from the quartz so mixed by them (*s*). Where title in
dispute.

Any person who enters on land pending the application for a mining lease of such land for the purpose of marking out any portion of it as a claim, or of including within the boundaries of any claim the land applied for, or any part of it, is deemed to have trespassed or encroached on such land (*t*); and the pendency of an application for lease is enacted to begin with the marking out of the land by the applicant for such lease (*u*). An applicant for a lease in New Zealand (*v*) who had not complied with the regulations could not maintain trespass against the holder of a miner's Pending
application for
lease.

(*p*) *Att-Gen. v. Lansell* (4), 9 V.L.R. (E.) 172; 5 A.L.T. 71 (1883).

(*q*) *Att-Gen. v. Lansell* (5), 10 V.L.R. (E.) 84; 5 A.L.T. 185 (1884).

(*r*) *Band of Hope and Albion Consols v. Young Band Extended Co.* (1), 8 V.L.R. (E.) 120; 3 A.L.T.

125 (1882).

(*s*) *Ibid* (2), 8 V.L.R. (E.) 277 (1882).

(*t*) Act No. 1120, sec. 70; and see sec. 65.

(*u*) *Ibid.*, sec 71.

(*v*) Under Act 30 Vic. No. 32 (N.Z.), sec. 108.

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right for entering on the land and marking out a claim upon it; if, however, the claim had been insufficiently marked out, the person marking it out would have been a mere wrongdoer, and would have been liable in trespass (*w*). The Act No. 1120, section 65, would by itself make a person taking up a claim after an application for a lease of the same ground a provisional trespasser only, subject to the fate of the application (*x*); but section 70 makes an entry on land marked out for a lease absolutely a trespass, whether such entry be for the purpose of occupying or otherwise interfering with the land or not (*y*), subject, however, to due compliance by the applicant for lease with the leasing regulations (*z*); and section 49 of the Act No. 1514 similarly protects a leaseholder pending an application for renewal of his lease.

Where lease has expired.

Where, however, the term of a lease has expired, all holders of miners' rights are equally entitled to take possession of the land, though the marking out of the land prior to the expiry of the lease confers no title, even though the miner marking out is and remains in possession after such expiry (*a*). And the defendant in a complaint for trespassing on a claim so marked out is entitled to show that at the time of the marking out a lease of the ground was held by a third party, and may put the lease in evidence to show the invalidity of the title on which the complainant relies (*b*).

Jus tertii.

But a *jus tertii*, or the alleged power of intervention by a third party to prevent an unauthorised act, which power has not been exercised, cannot be set up by a trespasser who has not a shadow of title in himself against a trespasser in prior occupation of the land (*c*).

Marking out for a lease.

Marking out and applying for a lease of land in the

(*w*) *Higgins v. Dyer*, 1 N.Z.J.R. (N.S.) M.L. 26 (1871); see Act 62 Vic. No. 38 (N.Z.), sec. 136, and Reg. 24.

(*x*) *Rendall v. Hadley*, 2 V.R. (M.) 21; 2 A.J.R. 105 (1871).

(*y*) *Hutcheson v. Erk*, 3 V.L.R. (M.) 1 (1877).

(*z*) *Antony v. Dillon*, 15 V.L.R.

240; 10 A.L.T. 231 (1889).

(*a*) *Durant v. Jackson*, 1 V.L.R. (M.) 6 (1875).

(*b*) *Cooper v. White*, 4 V.L.R. (M.) 10 (1878).

(*c*) *St. George and Band of Hope Co. v. Band of Hope and Albion Consols*, 2 V.R. (E.) 206; on appeal, 2 A.J.R. 127 (1871).

occupation of a person under his miner's right is not a trespass upon or unlawful interference with the land applied for. It is an insult rather than an injury to the person in possession, and forms no ground of action, especially as the marking out is the only legitimate means for a person acquiring or seeking to acquire a title by lease, and trying the claimholder's title to the claim (*d*).

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Trespass suits are perhaps more frequently instituted for the purpose of testing title, as in *Truswell v. Powning* (*e*), than for the recovery of damages, as in *Att-Gen. v. Boyd* (*f*). The latter remedy is usually sought by suit for encroachment (*g*), though of course persons maintaining trespass are entitled to prove and recover damages against the trespasser.

Trespass as a test of title.

In cases where there is no proof of actual damage done—where it is a mere matter of calculation and estimate—it is necessary for the court to ascertain by distinct evidence that the parties are trespassers (*h*).

Where no proof of damage.

The measure of damages will be ascertained as in an ordinary action of trespass, and where the injury is remote damages will not be allowed. Thus, it is no ground for damages in a suit for trespass that the continuing trespass of the defendants caused an obstruction to the plaintiffs obtaining a lease of the land comprised in their claim (*i*). The measure of damages is always made high, and even where there is no proof of actual damage, a wilful trespasser will not be allowed the expenses of working the mine; as against trespassers the highest value is taken, and the Supreme Court can on appeal from the Court of Mines, increase the damages awarded by the latter court, if considered insufficient (*j*).

Measure of damages.

(*d*) *Stephens v. Jolly*, 5 A.J.R. 162 (1874).

(*e*) 1 V.R. (M.) 13; 1 A.J.R. 18 (1870).

(*f*) 3 V.R. (E.) 192; 3 A.J.R. 13 (1872).

(*g*) See *post*, Sec. II, "ENCROACHMENT."

(*h*) *Att-Gen. v. Boyd*, 3 V.R. (E.) 192; 3 A.J.R. 18 (1872).

(*i*) *Vallancourt v. O'Rorke* (1), 1 V.R. (M.) 43; 1 A.J.R. 158 (1870).

(*j*) *United Working Miners G.M. Co. v. Prince of Wales Co.* (1), 5 W.W. & A'B. (M.) 50; N.C. 71 (1868).

(b) Who Can Sue for Trespass.

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Actual
possession not
necessary.

The holder of a miner's right who has established his title to a claim as against others who retain actual possession after adjudication against them can maintain trespass against those in possession. It is not necessary for a claimholder to have been in actual physical possession of his claim to entitle him to maintain trespass; he is not bound first to proceed for ejection and obtain actual possession (*a*). And if a plaintiff in a suit for trespass prove prior possession *de facto*, the legality of such possession in respect of compliance with the by-laws cannot be questioned by the defendant (*b*); and a defect in a plaintiff's title owing to his occupying a claim intersected by a public road does not defeat his right to sue for trespass as against a defendant who has entered without legal process (*c*).

Possession
de facto.

Trespass on
private land,

or a street.

Persons mining on private land before the passing of *The Mining on Private Property Act 1884* (*d*) with the consent of the owner were entitled to protection against trespassers (*e*); and an owner of land abutting on a public street might maintain trespass against any person mining on his half of the street (*f*).

Holder of claim.

Where the holder of a miner's right is in *bonâ fide* possession of ground, a lease of which he has applied for under a *bonâ fide* contract of purchase, he can maintain trespass against a mere wrongdoer (*g*); and the holder of a

(*a*) *White v. Perriam*, 5 V.L.R. (M.) 31; 1 A.L.T. 95 (1879); see *Cooper v. White*, 4 V.L.R. (M.) 10 (1878).

(*b*) *Wearne v. Froggatt*, 2 V.L.R. (M.) 1 (1876); *Fahey v. Koh-i-noor Q.M. Co.*, 3 W.W. & A'B. (M.) 4 (1866); *Grant v. Lawlor*, 3 V.L.R. (M.) 15 (1877).

(*c*) *Vallancourt v. O'Rourke* (1), 1 V.R. (M.) 43; 1 A.J.R. 158 (1879).
(*d*) 48 Vic. No. 796.

(*e*) *Woolley v. Ironstone Hill Lead Co.*, 1 V.L.R. (E.) 237 (1875); *Broadbent v. Marshall*, 2 W. & W. (E.) 115 (1863); *Astley United G. M. Co. v. Cosmopolitan G. M. Co.*,

4 W.W. & A'B. (E.) 96 (1867); and see *Zobel v. Croudace*, 18 N.S.W. L.R. (L.) 312 (1897).

(*f*) *Carvalho v. Black Hill South Extended Q.M. Co.*, 1 V.L.R. (L.) 225 (1875); *Reg. v. Davies* (1), 6 W.W. & A'B. (L.) 246 (1869); *Band of Hope Q.M. Co. v. Williams Freehold Co.*, 5 V.L.R. (E.) 257 (1879); but as to ownership of roads *ad medium filum vie*, see *Garibalâi Co. v. Craven's New Chum Co.*, 10 V.L.R. (L.) 233; 6 A.L.T. 93 (1884); and see *post*, Bk. II, Ch. IV, "GOLD MINING ON PRIVATE LAND."

(*g*) *Ah Tan v. Kapatzo*, 1 N.Z. J.R. (N.S.) M.L. 16 (1872).

permit under the Act 48 Vic. No. 18 (N.S.W.), sec. 45, who had entered into possession in accordance with the Act and the regulations could maintain an action of trespass in respect of such land (*h*). But where the boundary marks are not properly maintained a claimholder cannot maintain a suit for trespass for interference against a person who has been misled, and has marked out a claim on it (*i*); and an action will not lie for damages and expenses incurred in defending a suit for trespass before the Warden where the proceedings were not shown to have been malicious (*j*).

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The lessee of land may bring a complaint against a person trespassing on his leased land, whether such trespass be on the surface (as by erecting a fence) or otherwise, and whether mining operations have been thereby hindered or delayed or not, and the Warden has jurisdiction to hear and determine the complaint (*k*); and where, after the expiration of a lease, a miner, holding a miner's right, marked out land comprised in the lease, and entered into possession of the land as a claim, and the previous lessee, who held over after the expiration of his term, marked out the land for a lease, it was held that the miner was entitled to maintain trespass; *Critchley v. Graham* (*l*) distinguished, as in that case the termination was by forfeiture or abandonment, while in the present case the lease was determined by effluxion of time, and the miner was in lawful possession (*m*).

Suit by lessee.

An uncertificated insolvent, who is the holder of a miner's right, may maintain trespass before the Warden, and the interposition of his assignee in insolvency is not necessary (*n*). But if an uncertificated insolvent obtains a miner's right and takes up a claim, that document and any claim he may acquire under it will pass to his assignee if he inter-

Uncertificated
insolvent.

(*h*) *Ferrier v. Smith*, 13 N.S.W. R. (L.) 146; 8 W.N. 14 (1892).

(*i*) *Harris v. Labes*, 1 N.Z.J.R. (N.S.) M.L. 10 (1872).

(*j*) *Ahearn v. Hogan*, 1 N.Z.J.R. (N.S.) M.L. 45 (1873).

(*k*) *Extended Cross Reef Co. v. Creaver*, 4 A.J.R. 10 (1873).

(*l*) 2 W. & W. (L.) 211 (1863).

(*m*) *Durant v. Jackson*, 1 V.L.R. (M.) 6 (1875); *Cooper v. White*, 4 V.L.R. (M.) 10 (1878).

(*n*) *Fancy v. North Hurdsheld United Co.*, 8 V.L.R. (M.) 5; 3 A.L.T. 89 (1882); see *Madden v. Hetherington*, 3 V.R. (L.) 68; 3 A.J.R. 41 (1872).

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vene (*o*); if no intervention by the assignee has taken place he has a right to institute proceedings before the Warden (*p*).

Miner's right a
condition precedent.

The possession of a miner's right in a plaintiff claimholder is a condition precedent to a suit by him for trespass, but if he had a miner's right in force at the time when a cause of action for trespass accrued he is entitled to sue, although he may not have had a miner's right in force at the time the trespass began (*q*).

Illegal
occupation.

A person who is in illegal occupation of land cannot maintain trespass against the legal owner who forcibly dispossesses him. Thus, where Whitely and party, disputing the validity of a lease held and occupied by Schlemm, obtained miners' rights, entered on, and marked out and registered as a claim portion of the leased land, and being expelled by Schlemm, who was never out of possession, brought a suit for trespass against him, it was held that Whitely and party, having taken possession without legal warrant, were themselves trespassers, and could not proceed in trespass against Schlemm (*r*); and a no-liability company suing for trespass may be defeated by the defendant showing that five per cent. of its capital was not paid up at the time of its registration (*s*) in pursuance of the *Companies Act* 1890, Part II (*t*); and the trustees of a company which has let its mine on tribute for a longer term than its own lease cannot after the expiration of the lease maintain trespass against the tributers (*u*).

No-liability
company.

Tributers.

Collusive
recovery.

Possession by forfeiture collusively obtained gives no right to sue for trespass as against persons in possession.

(*o*) *Bourke v. Wright*, 3 N.S.W. L.R. (L.) 145 (1882).

(*p*) *Bourke v. Lucas*, 3 N.S.W. L.R. (L.) 215 (1882).

(*q*) *Sea Queen Co. v. Sea Quartz Co.*, 4 A.J.R. 130, 174 (1873); *Clerk v. Wrigley*, 4 W.W. & A.B. (M.) 74 (1867).

(*r*) *Whitely v. Schlemm*, 8 V.L.R. (M.) 58; 4 A.L.T. 115 (1882).

(*s*) *Park Co. v. South Hustler's Co.* (2), 9 V.L.R. (M.) 4; 4 A.L.T.

135 (1883).

(*t*) 54 Vic. No. 1074, sec. 309 (1). The five per cent. may be paid up either in money or money's worth; *Britannia United G.M. Co. v. Victoria United G.M. Co.*, 16 V.L.R. 533; 12 A.L.T. 46 (1890); and see *Thomas v. Nicholson*, 16 V.L.R. 861 (1890).

(*u*) *Penistan v. Great Britain Co.*, 5 A.J.R. 18 (1874).

Thus, the holder of a miner's right obtained a declaration of forfeiture and possession on payment for improvements; he took possession, but did not pay the money. The latter part of that order was quashed, but meanwhile a friend of the defaulters in collusion with them obtained a declaration of forfeiture and possession against them, registered himself for the claim and transferred it to the plaintiffs, who instituted a suit for trespass against the defendants, who were in possession under the first forfeiture. It was held that the forfeiture collusively obtained did not form a new title, and plaintiffs could not maintain the suit (*v*).

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(c) Suits for Trespass.

A suit for trespass may be instituted either in the Court of Mines (*a*) or before the Warden (*b*); but the jurisdiction conferred by the *Mines Act* 1890 on the Court of Mines and the Warden in trespass does not deprive a plaintiff of his right to proceed in another Court having jurisdiction. Thus, when a complaint for trespass is dismissed by the Warden by way of non-suit, the complainant having failed to make out his case, and no question of title having been decided, the complainant is not estopped from proceeding in the Supreme Court, although he has not appealed to the Court of Mines against the Warden's decision (*c*).

In a suit for trespass which is virtually a test of title it is the plaintiff's duty to show such a title as will empower him to maintain trespass. If the defendant challenges the complainant's title it lies upon him (the defendant) to show that the plaintiff in possession has a flaw in his title or is in illegal occupation, such as that he has not complied with the by-laws in taking up the claim (*d*).

Title must be shown.

(*v*) *Reardon v. Sayers*, 3 V.R. (M.) 19; 3 A.J.R. 126 (1872).

(*a*) Act No. 1120, sec. 135 (iii).

(*b*) *Ibid*, sec. 216; as to duty of Warden or Warden and assessors in suits for trespass, see sec. 239.

(*c*) *Aladdin G.M. Co. v. Aladdin*

and Try Again United G.M. Co., 6 W.W. & A'B. (E.) 266 (1869).

(*d*) *Mulcahy v. Walkalla G.M. Co.*, 5 W.W. & A'B. (E.) 103 (1868); on appeal to Privy Council, 40 L.J. P.C. 41; 2 A.J.R. 93 (1871).

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Sec. I.*

Possession
prima facie
evidence of title.

Possession alone is *prima facie* evidence of title, and is a sufficient title against a mere wrongdoer. The defendant must show his right to enter on the land; and a defect in plaintiff's title suing for trespass will not subject him to be defeated in a suit by a defendant entering without legal process according to the doctrine of *Critchley v. Graham (e)*.

Where all
complainants
have not miners'
rights.

A miner's right or miners' rights held by the complainants are a condition precedent to a suit for trespass, and where a number of miners sue for trespass and only some of them have miners' rights in force, the Warden cannot make an order for possession in favor of the complainants generally, or in favor of those holding miners' rights (*f*).

Apportionment
of damages.

And in a suit for trespass where damages are sought, and where all the complainants have not miners' rights, the damages ought to be apportioned, and an apportionment recovered only by those who had miners' rights at the time the cause of action arose (*g*); and in mining under a public road a person who has not obtained permission so to mine from the proper authorities cannot in a suit for trespass rely upon the fact that the opposite party had not obtained such permission (*h*).

Mining under
road.

Trespasser not
entitled to gold.

The law leans against trespassers, and as shown above will not only not allow a trespasser any portion of the gold obtained by him from the claim trespassed upon, but where quartz has been removed by a trespasser, such quartz, in the absence of evidence to the contrary, will be held to be auriferous, and a decree made for an account of the value of the gold removed (*i*).

Evidence of
trespass.

Where land was found to have been undermined, and the only communication with the part undermined was by

(*e*) *Cruise v. Crowley*, 5 W.W. & A'B. (M.) 27 (1868).

(*f*) *Bebro v. Bloomfield*, 5 V.L.R. (M.) 26; 1 A.L.T. 47 (1879).

(*g*) *Critchley v. Graham* (1), 2 W. & W. (L.) 71 (1863).

(*h*) *St. George and Band of Hope*

Co. v. Band of Hope and Albion Consols, 2 V.R. (E.) 206; 2 A.J.R. 81 (1871).

(*i*) *Att-Gen. v. Lamsell* (3), 8 V.L.R. (E.) 155; 3 A.L.T. 141 (1882).

drives from a shaft on adjoining land, it was held that in the absence of evidence to the contrary this afforded evidence of trespass and removal of the subsoil by the owner of such shaft (*j*).

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Sec. 1.*

SECTION II.—ENCROACHMENT.

(a) What will Constitute Encroachment.

A distinction is drawn in the *Mines Act* between trespass and encroachment, though the legal definition of trespass will include encroachment. In mining law encroachment means encroaching or trespassing by the holder of a claim without right or justification beyond the boundaries of his claim, whether on or below the surface, upon and within the boundaries of an adjoining claim. It may be regarded as trespass, but only as between adjoining claimholders, for though a claimholder can trespass on a claim which does not adjoin his he cannot encroach on such a claim.

Definition of encroachment.

As distinguished from trespass encroachment may be carried on underground for a long time before it is known, or even suspected. In case of a suspicion of encroachment an order may be obtained for inspection (*a*) of the mine the owner of which is suspected of encroaching; and where owners of property suspect that it is being encroached upon they are quite right to wait until they can fix definitely the responsibility on the persons encroaching, before taking legal proceedings, and any such delay is not an acquiescence in the encroachment which would disentitle the parties to relief (*b*).

Suspicion of encroachment.

If a person believes that his land is being encroached upon he should at once ascertain what his exact boundaries are, and if another person come near his boundary to sink a

Ascertaining boundaries.

(*j*) *Att-Gen. v. Lansell* (3), 8 V.L.R. (E.) 155; 3A.L.T. 141 (1882).

OF INSPECTION."

(*b*) *Lane v. Hannah*, 1 W. & W. (E.) 66 (1862).

(*a*) See *post*, Sec. II (*e*), "ORDERS

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Sec. 11.*

shaft, by reason of which he is led to believe that trespass or encroachment is intended, he should take immediate steps to assert his claim and prevent an encroachment, otherwise knowingly permitting an encroachment may be regarded as an acquiescence in it (*c*). But mere quiescence may not be acquiescence, and the doctrine of acquiescence does not apply to acts done on lands not belonging to the party said to have acquiesced (*d*).

Mode of
specifying
boundaries.

The manner in which the dimensions and boundaries of claims are shown must be specified by the by-laws. Under the Act No. 32 it was held that a by-law which omitted to specify how the boundary lines of a claim were to be drawn was void for uncertainty, and a complaint for encroachment could not be maintained in respect of a claim taken up under it (*e*).

(b) Who can Sue for Encroachment.

Title as against
a wrongdoer.

All lawful holders of claims are entitled to prevent their neighbours from encroaching on them. A person in possession of a claim, whether his title be good or bad, is entitled to recover damages in a complaint for encroachment against a common wrongdoer with no color of title (*a*). For though a miner may have a good title to his own claim, yet he has no right to mine beyond his boundaries and thus encroach upon land to which he has no title whatever.

Possession with-
out legal
occupation.

And a person in actual possession of a claim which has been wrongfully taken up without legal process according to the principle of *Critchley v. Graham* can maintain a suit for encroachment against all but the rightful owner (*b*); and in like manner a title by occupation can resist a suit for encroachment (*c*).

(*c*) *Band and Barton United Co. v. Young Band Extended Co.*, 7 V.L.R. (E.) 162 (1881).

(*d*) *Borton v. Howe*, 3 N.Z.C.A. 5; 2 N.Z.J.R. 79 (1875).

(*e*) *Linson v. Walsh*, Sp. Ct. Vic., March 23, 1860; *Aryus*, March 24, 1860.

(*a*) *Osborne v. Elliott*, 6 W.W. & A.B. (M.) 49; N.C. 20 (1869).

(*b*) *Truswell v. Powning*, 1 V.R. (M.) 13; 1 A.J.R. 18 (1870); *Wearne v. Froggatt*, 2 V.L.R. (M.) 1 (1876).

(*c*) *Barker's G.M. Co. v. Keating*, 1 V.R. (M.) 18; 1 A.J.R. 55 (1870).

The occupier of a machine area has no claim to the gold within his area as against a person who holds the land under miner's right as a claim; and a miner occupying land as a machine area under his miner's right by permit of the Warden cannot maintain encroachment against other miners within the boundaries of whose claim the machine area is situated for undermining such area and removing the gold. The occupier of the machine site has only a title to the surface. He has no right to the gold, and the claimholders have; and it was held that it was not necessary that the claimholders should have obtained the Warden's adjudication as against the holder of the machine area in accordance with *Critchley v. Graham* (*d*) in order to establish their right (*e*).

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Sec. II.
Encroachment
on machine area.

But where the holder of a miner's right was in occupation of ground as a residence site (*f*), and the defendant applied for a lease of such site with other ground, and commenced mining on the ground and within such residence site, and the lease was subsequently granted, and the residence area was excised, it was held that a suit for encroachment might be sustained by the holder of the residence area against the applicant for the lease (*g*).

Residence area.

Before the passing of *The Mining on Private Property Act* 1864 (*h*) a person holding a right to mine on private land could restrain another person holding a right to mine on adjoining private land from encroaching, on the principle of *Broadbent v. Marshall* (*i*), though an injunction was refused as to the auriferous earth raised, on the principle of *Millar v. Wildish* (*j*); and the same principle applied to mining under streets over private land (*k*).

Private
property.

(*d*) 2 W. & W. (L.) 211 (1863).

(*e*) *Vivian v. Dennis*, 3 W.W. & A'B. (M.) 29 (1866).

(*f*) Before the passing of *The Residence Areas Act* 1881, 45 Vic. No. 709.

(*g*) *Fahey v. Koh-i-noor Q.M. Co.*, 3 W.W. & A'B. (M.) 4 (1866). As to the rights of holders of residence areas see *post*, Bk. III, Ch. IV, Sec.

II, "RESIDENCE AREAS."

(*h*) 48 Vic. No. 796.

(*i*) 2 W. & W. (E.) 115 (1863).

(*j*) 2 W. & W. (E.) 37 (1863); *Astley United G.M. Co. v. Cosmopolitan G.M. Co.*, 4 W.W. & A'B. (E.) 96 (1867).

(*k*) *Western Freehold Co. v. Great Western Co.*, 4 W.W. & A'B. (E.) 44 (1867); *Woolley v. Ironstone*

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Public streets.

Where a company made a drive across a street past the centre of the road, and encroached on portion of the street occupied by another company, an injunction was granted against the encroachment, but only as to the ground beyond the *medium filum viæ* (l). But in the subsequent case of *The Garibaldi Co. v. Craven's New Chum Co.* (m) it was decided that a Crown grantee of land, with an exception or reservation in the grant of all gold and auriferous earth and stone, was not entitled to the road *ad medium filum*, and could not restrain a stranger from removing gold and auriferous earth and stone from the land, although such stranger might be a trespasser against the Crown, and that such a grant showed no title to the auriferous earth and stone; and over-ruling *Davis v. The Queen* (n), it was held that the definition of the boundary of land in a Crown grant by a road did not create a property in the soil of the road *ad medium filum viæ* (o).

Lessee in
possession.

A lessee in possession under a gold-mining lease is entitled to maintain encroachment and to restrain tortious mining on the land included in his lease, and the removal of gold therefrom (p); and it was held that an applicant for a lease whose application has been granted could proceed for encroachment and restitution of the gold taken out of the leased ground against a person who marked out and worked the ground for a claim subject to the application for the lease and before the granting of it (q).

Hill Lead G.M. Co., 1 V.R. (E.) 237 (1870); on appeal to Privy Council L.R. 2 App. Cas. 163; *Broadbent v. Marshall*, *supra*; and see *post*, Bk. II, Ch. IV, "GOLD MINING ON PRIVATE LAND."

(l) *Band of Hope Q.M. Co. v. Williams Freehold Co.*, 5 V.L.R. (E.) 257 (1879); *Carvalho v. Black Hill South Extended Q.M. Co.*, 1 V.L.R. (L.) 225 (1875); *Davis v. The Queen*, 6 W.W. & A'B. (E.) 106 (1869).

(m) 10 V.L.R. (L.) 233; 6 A.L.T. 93 (1884).

(n) *Supra*; and other cases cited, note (l).

(o) See the *Local Government Act*

1890; 54 Vic. No. 1112, sec. 395; and see *ante* Ch. II, Sec. VII (b), "PUBLIC HIGHWAYS." This ruling is not followed by the New Zealand Courts. As to the property in the soil on the side of a creek *usque ad medium filum aquæ*, see *Borton v. Howe*, 3 N.Z.C.A. 5; 2 N.Z.J.R. 97 (1875).

(p) *Aladdin G.M. Co. v. Aladdin and Try Again United G.M. Co.*, 6 W.W. & A'B. (E.) 266 (1869).

(q) *Barker's G.M. Co. v. Keating*, 1 V.R. (M.) 18; 1 A.J.R. 55 (1870). See, however, Act No. 1120, secs. 70, 71, passed subsequently to the above decision, making such an entry a trespass; and see *Hutchison*

But a company registered under the Act 27 Vic. No. 228 (r) which did not represent the persons originally registered for a claim, some of the registered claimholders having been excluded from the company, could not maintain a suit for encroachment (s). Bk. I. Ch. IV.
Sec. II.
Company not
representing
claimholders.

Neither could a person sue for encroachment who had marked out a claim under a by-law which was invalid as being *ultra vires*, though he might maintain trespass against a mere wrongdoer (t), even though such a person could not, under the doctrine of *Critchley v. Graham* (u), be dispossessed by mere entry without legal proceedings (v). Claim under in-
valid by-law.

(c) Suits for Encroachment.

Any claimholder on whose claim an encroachment is made may institute a suit for such encroachment before the Warden (a) or in the Court of Mines (b). The latter court has a concurrent jurisdiction with the Supreme Court (c), though it stands on the footing of an inferior court (d). Jurisdiction.

Possession is *primâ facie* evidence of title, and is a good and sufficient title *per se* as against a mere wrongdoer to subject him to a suit for encroachment; the *Mines Act*, sec. 135 (iii), does not confine the remedy, for encroachment to plaintiffs having a good title, or indirectly oblige them to show a good title, in addition to showing their possession undisturbed (e). Title by
possession.

And where plaintiffs were exclusive licensees in possession of private land suing defendants for encroachment on the Private land.

v. *Erk*, 3 V.L.R. (M.) 1 (1877); *Constable v. Pigtail Q.M. Co.*, 3 V.L.R. (M.) 7 (1877).

(r) *The Mining Companies Limited Liability Act* 1884.

(s) *Warrior G.M. Co. v. Cotter*, 3 W.W. & A'B. (M.) 81; and the same principle will apply to a company registered under the *Companies Act* 1890 (54 Vic. No. 1074) Part II.

(t) *M'Cafferty v. Cummins*, 5 W.W. & A'B. (L.) 73 (1868).

(u) 2 W. & W. (L.) 211 (1863).

(v) *Bottrell v. Waverley G.M. Co.*,

2 V.R. (M.) 16; 2 A.J.R. 133 (1871).

(a) Act No. 1120, sec. 216; as to duty of Warden or Warden and assessors in cases of encroachment, see sec. 239.

(b) *Ibid*, sec. 135 (iii).

(c) *Gunn v. Harvey*, 1 V.L.R. (E.) 111 (1875).

(d) *Colonial Bank v. Willan*, 5 A.J.R. 53 (1874).

(e) *Cruise v. Crowley*, 5 W.W. & A'B. (M.) 27 (1868); *Truswell v. Powning*, 1 V.R. (M.) 13; 1 A.J.R. 18 (1870).

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licensed land, it was held that it was not necessary to prove the title of the licensor (*f*).

Evidence of encroachment.

A plaintiff in a suit for encroachment will not, however, be allowed to prove a different case to that put forward in his bill. Thus, where plaintiffs by their bill and affidavits made a case of encroachment against the defendant company by means of branch drives, but failed to substantiate such encroachment, they were not allowed to prove encroachment by means of the defendant company's main drive, which was constructed five years previously, as that encroachment was a different case to the one set forth in the bill (*g*).

Witnesses.

Evidence of a defendant's manager who was engaged in an encroachment and his mining book as to underground workings should be received as true so far as they are consistent and uncontradicted (*h*).

Where no title in either party.

Where neither party has title the Court will not interfere. Under the Act No. 32, sec. 3 (*i*), a suit by one company driving for gold under a reserve from a shaft outside the reserve against another company similarly situated was dismissed without costs (*j*).

(d) Damages for Encroachment.

Valuation of damage.

The valuation of damage done by encroachment is always made high, with the feeling of *odium spoliatoris* (*a*); and on appeal to the Chief Judge (*b*) from the decree of the Court of Mines awarding damages for encroachment, the appellate Court may increase the damages if such damages be considered too low (*c*).

(*f*) *Astley United G.M. Co. v. Cosmopolitan G.M. Co.*, 4 W.W. & A'B. (E.) 96 (1867).

(*g*) *Parker's Freehold United Q. M. Co. v. Parker's United Co.*, 7 V.L.R. (E.) 16; 2 A.L.T. 130 (1881).

(*h*) *Att-Gen. v. Lansell* (4), 9 V.L.R. (E.) 172; 5 A.L.T. 71, 143 (1883).

(*i*) Compare Act No. 1120, sec. 15.

(*j*) *United Sir William Don G.M. Co. v. Koh-i-noor G.M. Co.*, 3 W.W.

& A'B. (M.) 63 (1866).

(*a*) *Att-Gen. v. Boyd*, 3 V.R. (E.) 192; 3 A.J.R. 18, 99, 130 (1872).

(*b*) Now the Supreme Court. See *post*, Bk. IV, Chap. IV, "THE APPELLATE MINING COURT," as to the vesting of the jurisdiction of the Chief Judge in the Supreme Court.

(*c*) *United Working Miners' G.M. Co. v. Prince of Wales Co.* (1), 5

Where an encroachment by a neighboring company has been unintentional and unconcealed the company encroaching is entitled to be allowed the costs of working the ground encroached upon (*d*); but a wilful trespasser will not be allowed, in taking an account of the value, any expenses of mining and separating the gold, and where there is no proof of actual damage done the maxim applies that as against trespassers the highest value is taken (*e*).

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Unintentional encroachment.

Wilful trespass.

The damage done to plaintiff's works by encroachment is the province of a court of law and is not a matter for an account in equity where the damage is reducible to the loss of gold; nor can the defendant be ordered to repair the damage (*f*).

Damage to works.

In a complaint for encroachment before the Warden, where several claimholders (plaintiffs) had not miners' rights at the time of the encroachment, it was held that the Warden should assess damages generally, and out of them award an amount in proportion to the number of shares held by the claimholders entitled to institute proceedings by virtue of their miners' rights (*g*); and where a mining company holding its claim by two trustees instituted a suit for encroachment, and miners' rights were produced for the company and one trustee but not for the other, the by-laws requiring registration of holders of claims as necessary to a valid title, it was held that the Warden should assess damages to those who produced miners' rights in respect of their shares only (*h*); and in case of an encroachment *de die in diem*, if some of the complainants have not miners'

Where all parties have not miners' rights.

W. W. & A' B. (M.) 50 (1868), where the various modes of estimating the value of auriferous earth are considered.

(*d*) *St. George United Co. v. Albion Co.*, 4 W. W. & A' B. (M.) 88 (1867); *Lehan v. Dillon*, 19 V. L. R. 730 (1893).

(*e*) *Att-Gen. v. Boyd*, 3 V. R. (E.) 192; 3 A. J. R. 18, 99, 130 (1872).

(*f*) *Astley United G. M. Co. v.*

Cosmopolitan G. M. Co., 4 W. W. & A' B. (E.) 96 (1867).

(*g*) *Critchley v. Graham* (1), 2 W. & W. (L.) 71 (1863); *Bebro v. Bloomfield*, 5 V. L. R. (M.) 26; 1 A. L. T. 47 (1879); *Chisholm v. United Extended Band of Hope Co.*, 4 W. W. & A' B. (M.) 31 (1867).

(*h*) *Sea Queen Co. v. Sea Quartz Co.*, 4 A. J. R. 130, 174 (1873).

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rights the Warden or the Court should divide the time, and give the damages accordingly (*i*).

(*e*) **Orders of Inspection.**

Powers of
Warden.

Apart from the power inherent in the Supreme Court to order inspection, the Warden has special power vested in him (*a*) by writing under his hand to authorise an entry, which is usually done by a mining surveyor, on any land or claim to ascertain if the owner of such claim is encroaching on his neighboring claimholders, and for that purpose to make use of the machinery of the party suspected of encroaching (*b*); and with regard to the power of obtaining use of such machinery, it has been held that orders for liberty to inspect a mine which is in full operation at the time the order is made are based on the supposition that the mine will go on working, and that there will consequently be facilities for going up and down (*c*).

Use of
machinery.

Inspection with
indirect object.

It is only reasonable that a mine owner should object to any inspection of his mine by adjoining mine owners, and to the publication of a knowledge of his works; and the Court will recognise this disinclination of mining companies to submit to inspection of their mines. Thus, where there was a suspicion that inspection was sought for an indirect object of obtaining a knowledge of the workings of an adjoining mine, the application for inspection was refused with costs (*d*); and in cases of encroachment, an order of inspection will not be granted so long as there are other means open to the parties of obtaining the required information (*e*).

Inspection for
rectification of
error.

But otherwise for the rectification of an error. Where a plan forming part of an agreement as to the boundaries of two mines showed the shaft in the wrong position, the

(*i*) *Critchley v. Graham* (1), 2 W. & W. (L.) 71 (1863).

(*a*) Act No. 1120, sec. 244.

(*b*) See *post*, Bk. IV, Chap. II, Sec. V, "SPECIAL POWERS OF THE WARDEN."

(*c*) *Att-Gen. v. Lansell* (1), 6 V.L.R. (E.) 134; 1 A.L.T. 177

(1880).

(*d*) *United Hand and Band of Hope Co. v. Winter's Freehold Co.*, 3 V.R. (E.) 77; 3 A.J.R. 59 (1872).

(*e*) *Band of Hope Q.M. Co. v. Williams Freehold Co.*, 5 V.L.R. (E.) 257 (1879).

evidence of the surveyor was not received to explain the discrepancy, but it was ordered that plaintiff should be at liberty to inspect defendant's mine in order to procure evidence of the true position of the encroachment complained of with reference to the real boundaries (*f*).

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Sec. III.*

In a motion by plaintiffs to restrain defendants from encroaching on plaintiffs' ground, and to ascertain the extent of the encroachment, if any, the case made by the plaintiffs was one of hearsay. But as the defendants by their answer had not stated in detail what they were actually doing, but made a general assertion that they were not encroaching, and had not stated that any definite injury would result from the inspection of their mine, an order of inspection was granted (*g*).

Hearsay.

And an order was made for the inspection by plaintiffs of the mining works of the defendant alleged by plaintiffs to be an encroachment on their private land (*h*); but inspection of a mine on private land was refused where no demand was made by a person entitled to inspect as on behalf of the Crown (*i*).

Private land.

And where persons are mining underneath public streets, and subsidence takes place, the corporation in charge of such streets may obtain an order of inspection (*j*).

Streets.

SECTION III.—INJUNCTION.

(a) Injunction Orders.

An injunction may be granted or a receiver appointed by interlocutory order of the Supreme Court on such terms as

Jurisdiction of
Supreme Court.

(*f*) *Band and Albion Co. v. St. George United Co.*, 3 A.J.R. 20 (1872).

(*g*) *Att-Gen. v. Prince of Wales G.M. Co.*, 5 W.W. & A.B. (E.) 208 (1868).

(*h*) *Att-Gen. v. Cant*, 2 W. & W. (E.) 113 (1863).

(*i*) *Att-Gen. v. Hustler's Consols*

Co., 3 V.R. (E.) 121; 3 A.J.R. 70 (1872); but see now Act No. 1514, Part II, sub. 9, as to encroachment on private land.

(*j*) *Mayor &c. of Ballarat East v. Victoria United G.M. Co.*, 4 V.L.R. (E.) 10 (1878); and see Act No. 1514, Part II, sub. 9.

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the Court may think just; and if an injunction is asked to prevent threatened or apprehended waste or trespass, such injunction may be granted whether the person against whom it is sought is or is not in possession under any color of title or otherwise, or (if not in possession) does or does not claim a right to do the act sought to be restrained under any color of title, and whether the estates claimed by both or either of the parties be legal or equitable (*a*).

As to streets.

Under the Act No. 32 an injunction was obtained by a party of miners mining under a public street against another party interfering with them, although the land could not be held under miner's right, on the ground that the party seeking the injunction were the earliest occupiers (*b*).

Where no question of title.

Where an application is made for an interlocutory injunction to restrain a nuisance to land by accumulation of sludge upon it, if there is no question of title or as to the fact of the nuisance, but only as to whether the nuisance is committed by defendants, an injunction will be granted without an issue at law being directed to ascertain that fact (*c*).

No-liability company.

And an interlocutory injunction to restrain mining on private land was granted against a no-liability company, on the ground of the peculiar character of the company in not being responsible for anything (*d*).

Jurisdiction of Warden.

Special power is vested in the Warden by the *Mines Acts* to grant an order enjoining persons named therein from encroaching on, using, or working a claim, on notice served twenty-four hours at least before the time of making the application (*e*); and he may grant an interim injunction order, to be in force for seven days, in cases of pressing

(*a*) *The Supreme Court Act* 1890 (54 Vic. No. 1142), sec. 63 (8); Reg. Gen. Ord. L, 11, 12.

(*b*) *In re Rogers ex parte Bunn*, Sp. Ct. Vic., Nov. 24, 1859; *Argus*, Nov. 25, 1859; *Meredith v. Bunn*, Sp. Ct. Vic., April 4, 1860; *Argus*, April 5, 1860; see Act No. 1514, Part II, sub. 9.

(*c*) *Bonshaw Freehold G.M. Co. v. Prince of Wales Co.*, 4 W.W. &

A'B. (E.) 126 (1867).

(*d*) *Att-Gen. v. Hustler's Consols Co.*, 3 V.R. (E.) 121; 3 A.J.R. 70 (1872).

(*e*) Act No. 1120, sec. 245; see also 59 Vic. No. 40 (W.A.), sec. 66; 37 Vic. No. 13 (N.S.W.), sec. 87; 62 Vic. No. 24 (Q.), sec. 123; 57 Vic. No. 24 (Tas.), sec. 149; 62 Vic. No. 38 (N.Z.), sec. 268.

emergency, without notice (*f*). An injunction order by the Warden is granted under special powers vested in him by the Act, and should be limited to time; the injunction may, however, be made perpetual on the final decree (*g*). But the Warden cannot grant an injunction pending an application for a lease (*h*). As a general rule in cases of mining business it is more convenient to grant an interim injunction to keep matters *in statu quo* till the hearing, than to direct an account of dealings to be kept (*i*).

The Courts of Mines and every judge thereof have the same powers of granting injunction orders as are vested in the Supreme Court or any judge thereof (*j*); and by the *Supreme Court Act 1890* the inferior courts have power to grant relief or redress in as full and ample a manner as might or ought to be done in like cases by the Supreme Court (*k*).

An injunction order will not be granted against a person not a party to the suit (*l*); and in order to obtain an injunction a plaintiff must show a *prima facie* case so strong that an inference fairly arises that he will ultimately succeed in his suit, though it need not follow that he will succeed (*m*); and where a plaintiff's equity is doubtful an injunction ought not to be granted (*n*).

It is also necessary that a plaintiff should be clearly informed of his rights and take steps to assert them at once, for an injunction will not be granted to restrain a trespass where the plaintiffs were aware that the defendants had worked the ground in respect of which the injunction is sought for two years, and had taken no steps to prevent

(*f*) Act No. 1120, sec. 246; see also 37 Vic. No. 13 (N.S.W.), sec. 88; 62 Vic. No. 24 (Q.), sec. 125; 59 Vic. No. 40 (W.A.), sec. 67.

(*g*) *Keast v. D'Angri*, 4 A.J.R. 61 (1873).

(*h*) *Hutcheson v. Erk*, 3 V.R. (M.) 1 (1872); and see *post*, Bk. IV, Ch. II, Sec. V, "SPECIAL POWERS OF THE WARDEN."

(*i*) *Barclay v. Neeld*, 11 W.N. (N.S.W.) 9 (1894).

(*j*) Act No. 1120, secs. 135, 195, 196.

(*k*) 54 Vic. No. 1142, secs. 6, 7, 8.

(*l*) *Cruthers v. White*, 1 W.W. & A'B. (E.) 133 (1864).

(*m*) *Band of Hope and Albion Consols v. All Saints Co.*, 2 V.R. (E.) 83; 2 A.J.R. 37; on appeal, 2 A.J.R. 49 (1871).

(*n*) *Att-Gen. v. Scholes*, 5 W.W. & A'B. (E.) 164 (1868).

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Want of title.

Mining
registrar.

them (*o*); and parties in possession without showing any title cannot obtain an injunction until the hearing of the suit (*p*); neither will an injunction be granted with reference to an injury already accomplished (*q*); and it seems a mining registrar is not subject to an injunction in his official capacity (*r*).

Irreparable
injury.

An injunction may be set aside if the party obtaining it has not fully and clearly stated facts sufficient to show that irreparable damage is likely to accrue if the injunction be not granted (*s*). A corporation having the care and management of streets may, as representing the ratepayers, sue to restrain irreparable damage thereto by mining under the streets and thereby causing subsidence, without joining the Attorney-General as a party (*t*).

Construction of
order.

An injunction order is not to be interpreted retrospectively unless its terms clearly require it (*u*); and where an injunction order admits of two constructions the defendants may properly assume the responsibility of putting their own construction on it (*v*).

Terms on which
granted.

When a plaintiff obtains an injunction the order is made on such terms as the Court may think fit, those terms being the price of the injunction (*w*). The order does not necessarily determine the suit, but only maintains intact and inviolate property which might otherwise, pending the final decision of the Court, be destroyed (*x*).

Title by
possession.

A title acquired by taking possession of ground subject matter of an application for injunction and subsequently

(*o*) *Band and Barton United Co. v. Young Band Extended Co.*, 7 V.L.R. (E.) 162 (1881).

(*p*) *Band of Hope and Albion Consols v. St. George and Band of Hope United Co.*, 1 V.R. (E.) 183; 1 A.J.R. 174 (1870); on appeal, 2 A.J.R. 127 (1871).

(*q*) *Bonshaw Freehold G.M. Co. v. Prince of Wales Co.* (2), 5 W.W. & A'B. (E.) 140 (1868).

(*r*) *Keast v. D'Angri*, 4 A.J.R. 61 (1873).

(*s*) *Kidd v. Chibnall*, 4 V.L.R.

(L.) 488 (1878).

(*t*) *Mayor &c. of Ballarat v. Victoria United G.M. Co.*, 4 V.L.R. (E.) 10 (1878).

(*u*) *Mulcahy v. Walkalla Co.*, 5 W.W. & A'B. (E.) 103 (1868).

(*v*) *Astley United G.M. Co. v. Cosmopolitan G.M. Co.*, 4 W.W. & A'B. (E.) 96 (1867).

(*w*) *Mulcahy v. Walkalla Co.*, *supra*.

(*x*) *Band of Hope and Albion Consols v. All Saints Co.*, 2 V.R. (E.) 83; 2 A.J.R. 37, 49 (1871).

obtaining registration therefor, was held not to be a sufficient defence to such application (*y*). But on an application for an injunction under the Act 30 Vic. No. 32 (N.Z.), in an action for injury to lateral support, to restrain the defendant from continuing or repeating acts calculated to affect injuriously the plaintiff's land, it was held that the plaintiff might rely on his possession merely, without showing in what way he acquired the right to mine (*z*). In case of an appeal from the Warden an order for an injunction or receiver pending the appeal may be granted by the Warden whose decision is appealed from, on the application of any of the parties interested in the appeal (Act No. 1120, sec. 263); and a similar order may be made when a special case is reserved by the Warden for the opinion of the Supreme Court (sec. 236).

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Sec. III.*

In case of
appeal.

(b) Breach of Injunction Order.

The fact that a complete and literal compliance with an injunction order would stop the defendants from working is not an excuse for breach of the injunction; it is a ground for moving the Court to modify the injunction, and such a motion may be made by a defendant even when in contempt for disobedience of the order (*a*). But finishing work necessary to the stability or use of a mine is not a breach of an injunction against the owner of such mine not to work it (*b*). If the works cannot go on without doing some mischief, the works must be stopped, or the injunction will be regarded as broken; but a mere oversight subjecting a defendant to the liability of the consequences of the breach of an injunction will not be considered a contempt (*c*).

Excuse for
breach.

Finishing work.

And where after an injunction was granted the defendant purchased the interest of some of the plaintiffs in the claim, and continued mining regardless of the injunction, it was

Transfer of
interest.

(*y*) *Grant v. Lawlor*, 3 V.L.R. (M.) 15 (1877).

(*z*) *Great Extended Sluicing Co. v. Hales, Mac.* (N.Z.) 896 (1871).

(*a*) *Bonshaw Freehold G.M. Co. v. Prince of Wales Co.* (2), 5 W.W.

& A'B. (E.) 140 (1868).

(*b*) *Mulcahy v. Waihalla Co.*, 5 W.W. & A'B. 103 (1868).

(*c*) *Bonshaw Freehold G.M. Co. v. Prince of Wales Co.*, *supra*.

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held, on motion to commit him for alleged breach of the injunction order, that the motion must be refused, as he ought not to be punished for doing that which some of the plaintiffs had, by transferring their interest to him, allowed him to do (*d*).

Sequestration of
estate of
company.

Where the order directing an injunction was bad and unworkable, sequestration of a company's estate for disobedience of it (*e*) was refused; and it appears that in any event a rule for the sequestration of the property of a company for breach of an injunction could not be made absolute without production of the writ in Court (*f*).

Defect in title.

A defect in plaintiff's title is no answer to a motion for breach of an injunction which has been granted, though such defect might be shown and taken advantage of in answer to a motion for the injunction (*g*).

Commitment on
breach of order.

Disobedience of a Warden's order to cease trespassing is punishable by commitment under the Act No. 1120, sec. 249 (*h*), and an order for commitment may be obtained *ex parte* on proof by affidavit of wilful disobedience; and a prisoner so committed may be discharged on performance of such injunction order, or upon payment to or on behalf of the person obtaining such order of commitment of full compensation for the breach of such part of the injunction order as can no longer be performed, together with all costs incurred in obtaining the commitment (*i*).

Private land.

The procedure for injunction with regard to private land will be dealt with in a subsequent chapter relating to gold-mining on private land (*j*).

(*d*) *Att-Gen. v. Boyd*, 4 A.J.R. 18, 99, 130; 3 V.R. (E.) 192 (1873).

(*e*) Under *The Common Law Procedure Statute* 1865, sec. 243.

(*f*) *Parade G.M. Co. v. Black Hill South Extended G.M. Co.*, 5 A.J.R. 85 (1874). Under *The Common Law Procedure Statute* an injunction might be enforced by sequestration of the property of a company and the rule *nisi* was required to be drawn up on reading the writ of injunction. The writ of injunction was, however, abol-

ished by *The Judicature Act*, and an injunction is now granted under that Act by interlocutory order of the Supreme Court; 54 Vic. No. 1142, sec. 63 (8).

(*g*) *Astley United G.M. Co. v. Cosmopolitan G.M. Co.*, 4 W.W. & A'B. (E.) 96 (1867).

(*h*) *Re Yung Hing*, 4 A.J.R. 57 (1873).

(*i*) Act No. 1120, sec. 250.

(*j*) See Bk. II, Ch. IV, "GOLD-MINING ON PRIVATE LAND"; and see Act No. 1514, sec. 102, *et seq.*

CHAPTER V.

THE MEANS BY WHICH INTERESTS IN CLAIMS MAY BE DETERMINED.

SEC. I.—BY ABANDONMENT.

- (a) Actual or Intentional Abandonment.
- (b) Constructive Abandonment.
- (c) Means of enforcing Abandonment.

SEC. II.—BY FORFEITURE.

- (a) Forfeiture under the By-laws.
- (b) What will constitute Forfeiture.
- (c) Illegal Occupation.
- (d) Means of enforcing Forfeiture.

SECTION I.—BY ABANDONMENT.

(a) Actual or Intentional Abandonment.

A CLAIMHOLDER may voluntarily abandon his claim at any time, and such abandonment amounts to a relinquishment of it in favor of any portion of the mining public who may choose to take it up; and where a claim has been actually abandoned it is open to the first legal claimant (a), and may be marked out as a claim by any holder of a miner's right (b); or applied for as a lease.

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Voluntary
abandonment.

The well-known case of *Critchley v. Graham* (c) formulated an axiom that claims forfeited or constructively

*Critchley v.
Graham.*

(a) *Collins v. O'Dwyer*, 5 W.W. & A'B. (M.) 30 (1868).
(b) *Keast v. D'Angri*, 4 A.J.R.

61 (1873).

(c) 2 W. & W. (L.) 211 (1873).

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abandoned could only be taken possession of under the adjudication of the Warden. But this axiom will not apply to a claim which has been actually or intentionally abandoned. No express renunciation of a claim is necessary to show that it has been abandoned, as a miner, after satisfying himself that his claim was worthless, could not be expected to give notice to the world that he had thrown up his interest in it (*d*).

Applied to
abandoned
claims.

And, indeed, the application of *Critchley v. Graham* to claims actually and intentionally abandoned would necessarily result in great hardship and inconvenience, for it would be manifestly unjust to require a person wishing to take up a claim registered in the name of another, and which may have been actually abandoned for a long time, to search through the world for the original registered owner for the purpose of making him a defendant, or to obtain substitution of service of a summons upon him in case he could not be found; while it would be still more unjust to submit to vexatious proceedings before the Warden, and consequent costs, a man who had voluntarily relinquished his claim, and who had no desire to defend his title.

Adjudication
not necessary.

And thus it is now a settled principle in mining law that where ground has been abandoned *de facto* it may be taken up by any holder of a miner's right, without any previous adjudication of abandonment (*e*); though in cases where possession has not been actually and intentionally abandoned, the possessory right of the occupier can only be put an end to by a regular adjudication of forfeiture or abandonment (*f*).

Where claim
renounced.

In *Critchley v. Graham* the Court had to deal with the case of forfeiture against miners in clear visible possession, and intimated that it would decide otherwise in case of

(*d*) *Warrior G.M. Co. v. Cotter*, 3 W.W. & A'B. (M.) 81 (1866); and see 62 Vic. No. 38 (N.Z.), sec. 151.

(*e*) *Mulcahy v. Walthalla Co.*, 5 W.W. & A'B. (E.) 103 (1868); on

appeal to Privy Council, 40 L.J. P.C. 41; 2 A.J.R. 93 (1871).

(*f*) *Woodward v. Earle*, 2 N.Z. J.R. 12 (1874); following *Critchley v. Graham*, *supra*.

actual abandonment. In an earlier case, *Landry v. Burton* (g), it was taken for granted that abandonment without a Warden's order put an end to title. In that case, L took up a quartz claim under the Maryborough by-laws, 1859, which provided that a quartz claim should be taken possession of by fixing two posts along the line of reef, one at each end of the claim, and the claim would extend laterally 150 feet on each side of the base line; but on one side he could not take the full width allowed, as C already occupied an alluvial claim there. This claim was afterwards abandoned by C, and L took possession of it as part of his quartz claim without re-pegging. Subsequently B pegged out the alluvial claim without any adjudication, alleging that it had been abandoned *de facto* by C, whereupon L sued him for trespass on his quartz claim, contending that on abandonment of his claim by C, that claim, being within 150 feet of his base line, became part of his original quartz claim. It was held that as L had not re-pegged or done anything to assert his right to the alluvial claim after the abandonment by C, his quartz claim remained as it was as to its boundaries, and that B was entitled to take up the abandoned claim, and was not a trespasser. The question of abandonment was not argued; C had evidently relinquished the claim without any intention of coming back to it, and people forgetting a right as valueless would not be likely to expressly say that they abandoned it (h). So, where a person took up a prospecting area under the New South Wales regulations, and left it unoccupied for two years, his title to the land lapsed absolutely, and any other person could become the registered holder of it (i).

And in like manner a sluicing claim duly applied for (j) ^{Sluicing claim.} can be taken possession of as abandoned ground without an adjudication of forfeiture or abandonment if abandoned *de facto*; but if the alleged abandonment is merely suspension

(g) Sp. Ct. Vic., June 27, 1862; *Argus*, June 28, 1862.

(h) *Warrior G.M. Co. v. Cotter*, 3 W.W. & A'B. (M.) 81 (1866).

(i) *Mongan v. Readford*, 5 N.S.W. L.R. (L.) 383; 1 W.N. 86 (1884).

(j) *Castlemaine By-law No. III*, sec. 8, and By-law No. X.

*Bk. I. Ch. V.
Sec. I.* of work on the claim which is *bonâ fide* for want of sufficient water for sluicing purposes, this will not amount to actual abandonment (*k*).

By-laws.

What is
abandoned
ground.

The Act No. 1120, sec. 106 (x), authorises the mining boards to make by-laws determining what shall constitute relinquished, abandoned, or deserted claims, as distinguished from forfeited claims; and section 10 provides that "any claim which shall be apparently unoccupied, and upon which there is no plant or machinery, and which has been unworked for a longer period than is allowed by the by-laws of the district, or for any division or part thereof, in which such claim is situated, shall be deemed to be actually abandoned ground, and may, without any adjudication of forfeiture or abandonment, be taken up and registered as a claim in accordance with the by-laws by any holder of a miner's right, but subject nevertheless to the rights (if any still subsisting) of any previous occupier of such ground."

Cancellation of
registration.

In view of this provision, therefore, though such a proceeding is, as before shewn, unnecessary, it may prove a wise precaution for a claimholder who desires to relinquish his claim within the time stated by the by-laws under the above section to expressly abandon it, and apply to the mining registrar to have his registration of it cancelled, in order to save himself from the possible contingency of a complaint before the Warden at the suit of any person who may be desirous of taking up the abandoned claim.

(b) Constructive Abandonment.

Definition.

A claimholder may, however, without wishing to relinquish his claim, by default in working it or by other means so neglect it that the law justly construes such neglect or default into a virtual abandonment of the claim. This is called constructive abandonment as distinguished from actual or voluntary abandonment, and in such a case the principle

(*k*) *Harders v. Abbott*, 9 A.L.T. 152 (1887).

of *Critchley v. Graham* will apply, viz., that the Warden's adjudication of possession must be obtained as against the claimholder by any person seeking to take advantage of the abandonment (a). *Bk. I. Ch. V.
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The courts will always lean against the view of actual or intentional abandonment unless the claim be relinquished by express declaration of the owner, such as cancellation of his registration. Intentional abandonment is only to be proved by cogent evidence of express declaration, or of unambiguous acts or conduct; on the other hand any act or proceeding on the part of the claimholder showing that he had no intention of abandoning his claim, or that he still claimed to retain his interest in it, is sufficient to bring the case within the dictum of *Critchley v. Graham* (b). Evidence of intentional abandonment.

Resumption of work on a claim which has been actually or constructively abandoned will not cure the defect in the title, or create a new title. To make land unoccupied so that it can be taken up as a new claim it should either have been actually abandoned or adjudged forfeited by the Warden; otherwise all forfeitures might be avoided by a mere resumption of work and going through the form of re-pegging the ground (c). Resumption of work.

"The next objection," says Molesworth, J. (d), "is that the ground said to have been abandoned ought to have been declared abandoned by a Warden before the plaintiffs were at liberty to occupy it, but the cases which require such an adjudication are those of constructive forfeiture, and not of abandonment in fact." In the case under notice the holders of a claim, after registering it under the by-laws, obtained a lease of part of the same ground, and it was held by Molesworth, J., that this afforded a presumption that they had abandoned any portion of the original claim which was *Mulcahy v. Wathalla Co.*

(a) *Collins v. O'Dwyer*, 5 W.W. & A'B. (M.) 30 (1868); *Warrior G.M. Co. v. Cotter*, 3 W.W. & A'B. (M.) 81 (1866).

(b) *Mulcahy v. Wathalla Co.*, on appeal to Privy Council, 40 L.J.

P.C. 41; 2 A.J.R. 93 (1871).

(c) *Coles v. Sparta*, 3 W.W. & A'B. (M.) 21 (1866).

(d) *Mulcahy v. Wathalla Co.*, 5 W.W. & A'B. (E.) 103 (1868).

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Sec. 1.*

not included in the parcels of the lease; and that working a shaft which was partly on the excluded ground, but merely for the purpose of working the ground included in the lease, did not negative the presumption of abandonment. On appeal to the Privy Council, however (*e*), their Lordships held that the very smallest act *animo possidendi* was sufficient to negative the presumption of abandonment, and that in the absence of some strong evidence to the contrary, or of some adverse possession, the continued possession of any part of any district of land held under one title was in itself continued possession of the whole.

Taking up claim afresh.

Taking up a claim afresh is an abandonment of the title acquired by a previous taking up (*f*), and in re-pegging and re-registering a claim each successive registration will constitute an abandonment of the previous title (*g*).

Block claim within frontage claim.

Thus, taking up a block claim within the limits of a frontage claim will be cogent evidence of an intention to abandon the frontage title to the extent of the block claim taken up; and a claimholder holding under such new title cannot, when the new title is assailed, set up his former title as a defence (*h*).

N.S.W. regulations.

But where A took up and registered in succession two quartz claims under the New South Wales regulations, each of the full area allowed, and B, contending that the taking up of the second claim was a constructive abandonment of the first claim, pegged out and applied to be registered for the first claim as being an abandoned claim, but did not get actual possession, it was held that the occupation of the second claim by A was not constructive abandonment of the first claim and that B's registration was not conclusive against A (*i*).

(*e*) 40 L.J.P.C. 41; 2 A.J.R. 93 (1871).

(*f*) *Barker's G.M. Co. v. Keating*, 1 V.R. (M.) 18; 1 A.J.R. 55 (1870).

(*g*) *O'Sullivan v. Clarke*, Ch. Ct. of Mines, Dec. 1, 1868; *Argus*, Dec. 2, 1868.

(*h*) *United Extended Band of*

Hope Co. v. Tennant, 3 W.W. & A'B. (M.) 41 (1866); *Great North-West Co. v. Sayers*, 4 W.W. & A'B. (M.) 64 (1867); *M'Cafferty v. Cummins*, 5 W.W. & A'B. (L.) 73 (1868).

(*i*) *Lucas v. Neeld*, 16 N.S.W. L.R. (E.) 257; 12 W.N. 17, 57 (1895).

A collusive recovery for forfeiture does not constitute a new title to the claim; though acquiescence in such a collusive recovery is an abandonment of the title of the previous holder as between him and the mining public (*j*). *Bk. I. Ch. V. Sec. I.*
Collusive recovery.

Pumping water out of a claim at the expense of an adjoining claimholder, unless such pumping be for the purpose of reaching and working the earth in the claim, is not working the claim, and is not sufficient (*k*) to protect it from the consequences of abandonment; nor is burning quartz upon the claim, where the quartz was taken from another mine, and unconnected with the mining of the claim (*l*). Pumping.

But a delay in proceeding to work (*m*) pending survey of a claim, where the applicants had difficulty in obtaining the services of a surveyor, who had no office within ten miles, was held not to constitute proof of abandonment under the by-laws (*n*). Excusable delay.

Where a shareholder in a claim offered his share to his co-partners if they would give him a release, which they refused to do, and he afterwards allowed his share to lie dormant, and refused to pay his share of expenses towards sinking a shaft, it was held that he had not been guilty of such conduct as would reasonably lead his partners to suppose that he had abandoned his share, and that he was entitled to his interest in the claim (*o*). But otherwise where a partner resigned his share, and through carelessness refrained from asserting his right to it for a period of nine years (*p*). Share lying dormant.

A person applying for too much ground (Gippsland by- Abandonment of excess area.

(*j*) *Moore v. White*, 4 A.J.R. 17 (1873); *Reardon v. Sayers*, 3 V.R. (M.) 19; 3 A.J.R. 126 (1872).

(*k*) *Castlemaine By-law*, No. XII, sec. 8, Aug. 18, 1863.

(*l*) *Longbottom v. White*, 3 W.W. & A'B. (M.) 35 (1866).

(*m*) *Beechworth By-law*, No. XIV, Nov. 19, 1867, as to laying off, surveying and taking up frontage claims.

(*n*) *Atwell v. Ryan, Atwell v. Landrigan*, 6 W.W. & A'B. (M.) 21 (1869).

(*o*) *Heine v. Klein*, Sp. Ct. Vic., March 21, 1861; *Argus*, March 22, 1861.

(*p*) *Cohn v. Heine and others*, Sp. Ct. Vic. (E.), Oct. 31, 1867; *Argus*, Nov. 1, 1867; and see *Bk. III, Ch. I, post*, "MINING PARTNERSHIPS."

*Bk. I. Ch. V.
Sec. I.*

laws, 17, 29) may abandon part of the claim improperly taken, and defend his title to the portion properly taken, if he has been put in possession of the proper claim by the Warden (*q*); but the part into possession of which he has been put by the Warden will become a new claim, and should be pegged and registered as the smaller area.

Payment of
drainage
assessment.

Under a by-law containing a provision that a claim should not be liable to forfeiture during any period for which drainage fees were being paid (*r*) the claim is not protected from being declared abandoned by the Warden, on an application to be put in possession of such claim, on the ground that the owners of it are liable to pay drainage assessment whether such payment has been made or not; and *quære* whether an actual payment of such drainage fees and not a mere liability to pay would be sufficient, for persons are not allowed to obtain claims at the trifling expense of a miner's right, and ignore occupancy as a condition of title (*s*).

(c) Means of Enforcing Abandonment.

Jurisdiction.

The question whether or not a claim may be considered constructively abandoned may be determined by the Court of Mines (*a*) or by the Warden (*b*); and the inference of abandonment is a matter that is left to the absolute discretion of the Court or Warden before whom the question is tried (*c*).

Complaint
before the
Warden.

The usual means of enforcing abandonment is by complaint before the Warden, who has jurisdiction under a by-law to hear and determine suits as to abandonment (*d*) without being expressly named in the by-law; for it is not necessary to the efficacy of a by-law made under section 106 (x) of the *Mines Act* 1890 that it should point out a

(*q*) *Bryson v. McCarthy*, 6 W.W. & A'B. (M.) 35, N.C. 18 (1869).

(*r*) Sandhurst By-law, No. VI, secs. 2, 9.

(*s*) *Christian v. Kenworthy*, 3 W. & A'B. (M.) 11 (1866).

(*a*) Act No. 1120, sec. 135 (i).

(*b*) *Ibid.*, sec. 216.

(*c*) *Lewis v. Pearson*, 4 W.W. & A'B. (M.) 23 (1857).

(*d*) Castlemaine By-law, No. XII, sec. 8.

person to adjudicate, as section 216 shows an intention to give jurisdiction to the Warden in all cases of disputed ownership of claims, and the duty of adjudication may be left to him as the ordinary officer (e). *Bk. I. Ch. V.
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Under the Act No. 32 a by-law providing that the Warden might declare any claim "relinquished" if not worked in a *bonâ fide* manner was held good and sufficient under section 111 of that Act, enabling mining boards to make by-laws prescribing the events in which claims should be deemed to be "abandoned" (f). Relinquished
claims.

It is not necessary for a plaintiff in seeking to enforce abandonment or forfeiture to negative all the exceptions in a by-law protecting an unworked claim from abandonment which rest upon facts lying peculiarly within the defendant's knowledge (g). Negating
exception.

An adjudication of abandonment by the Warden enures only to the party in whose favor the Warden decides; it cannot be taken advantage of by others (h). And in a complaint seeking to enforce abandonment before the Warden, the Warden must decide whether the claim is abandoned or not; such a question is not a proper ground for a special case, resting as it does upon facts (i). Effect of
Warden's order.

SECTION II.—BY FORFEITURE.

(a) Forfeiture under the By-laws.

When a miner has lawfully acquired a claim the law requires nothing more from him than an obligation to work it, and this obligation may be regarded as the true considera- Obligation to
work.

(e) *Longbottom v. White*, 3 W.W. & A'B. (M.) 35 (1866); see *post*, Bk. IV, Chap. II, "WARDENS OF THE GOLDFIELDS."

(f) *Perkins v. Sharples*, Sp. Ct. Vic., March 28, 1861; *Argus*, March 30, 1861; compare Act No. 1120, sec. 106 (x), empowering mining

boards to make by-laws as to "relinquished" claims.

(g) *Longbottom v. White*, 3 W.W. & A'B. (M.) 35 (1866).

(h) *Critchley v. Graham* (2), 2 W. & W. (L.) 211 (1863).

(i) *Small v. Dyer*, 5 W.W. & A'B. (M.) 1 (1868).

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tion for which he receives the right and privilege to work and mine on Crown land; if he fails in the obligation he at once becomes liable to forfeit all interest in his claim.

Events on which
forfeiture
accrues.

The by-laws determine the events on which the title to a claim shall become forfeited (*a*), and compliance with the by-laws as regards the proper working of a claim will be strictly enforced by the courts (*b*); and to obtain forfeiture of a claim for non-working the evidence of no work having been done must be certain from careful examination of the whole area (*c*); for it is a maxim that Courts are rigid in construing laws imposing forfeiture (*d*), though they will not adjudge forfeiture unless there are express words in the by-law saying that a forfeiture is to be worked (*e*). "All Courts, whether of equity or of law, lean against a forfeiture, and when they feel that a right of forfeiture has been harshly exercised, they do all in their power to find some loophole of escape from his position for the person so treated" (*f*).

Construction of
by-laws.

By-laws are required to be construed according to the same rules as are applied by courts of justice to Acts of Parliament (*g*); and it must be borne in mind that conditions of forfeiture are to be determined by the by-laws in force at the time the claim was taken up and is held, notwithstanding their subsequent repeal and that fresh conditions of forfeiture are imposed by the repealing by-law; the by-laws under which the claim has been registered, and not the circumstance of the forfeiture having occurred, determines the system under which any forfeiture is deemed to have taken place, and according to which system it is to be enforced (*h*). And if a by-law enacts a forfeiture, but omits to point out by whom the forfeiture may be

(*a*) Act No. 1120, sec. 106 (vii).

(*b*) See *Thompson v. Land*, 3 W. & A.B. (M.) 13 (1866); *Beavan v. Rigby*, 2 V.L.R. (M.) 7 (1876).

(*c*) *Zeppon v. Leslie*, Hore Dig. (Tas.) 79 (1887).

(*d*) *Weddell v. Howse* (1), 8 V.L.R. (M.) 44; 4 A.L.T. 95 (1882).

(*e*) *Thomas v. Kinnear* (1), 2 W.

& W. (L.) 221 (1863).

(*f*) *Per Owen, J., Baker's Creek C.G.M. Co. v. Hack*, 15 N.S.W. L.R. (E.) 207; 10 W.N. 217 (1894).

(*g*) *Lavelor v. Stiggants*, 2 V.L.R. (M.) 17 (1876).

(*h*) *Mitten v. Spargo*, 1 A.J.R. 69; *Reg. v. Clow, ex parte Oliver*, 5 W.W. & A.B. (L.) 89 (1868).

enforced, such by-law is not thereby rendered inoperative, but the forfeiture can be enforced by any holder of a miner's right (*i*); and when land is once forfeited it is not necessary first to proceed for a penalty; the land is open to the first claimant who shall legally proceed to enforce the forfeiture (*j*).

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Forfeiture for non-working does not in itself invalidate the title to a claim, so as to deprive the claimholder absolutely of his interest in it. It makes the interest in a claim not void, but voidable, and the only means of avoiding it is by taking proceedings for forfeiture and possession, on the principle of *Critchley v. Graham* (*k*). The claim cannot be taken up as actually abandoned ground (*l*). There is a material distinction between actual forfeiture and liability to forfeiture; forfeiture can only be worked out by the judgment of a competent tribunal lawfully set in motion for the purpose (*m*).

Interest not
void but
voidable.

A claim is held under the by-law under which it was taken up; a miner who has become possessed of a claim under a by-law authorising the occupation of a certain area, which by-law is subsequently repealed by another by-law limiting the size of claims to a smaller area and not saving existing rights, nevertheless holds and occupies his claim under the first by-law as originally taken up, and does not forfeit the claim or the excess area under the repealing by-law (*n*).

Claim held
under repealed
by-law.

Neither will forfeiture of a claim be regarded as an assignment by operation of law, and the party put in possession of it is not an assignee of the interest of the former holder, either as to date of title or otherwise. A person going into possession of a legally forfeited claim creates a new title for himself, which title is distinct from and irre-

Forfeiture not
an assignment.

(*i*) *Oxley v. Little*, 5 W.W. & A'B. (M.) 14 (1868).

(*j*) *Collins v. O'Dwyer*, 5 W.W. & A'B. (M.) 30 (1868).

(*k*) 2 W. & W. (L.) 211 (1863).

(*l*) *Clerk v. Wrigley*, 4 W.W. &

A'B. (M.) 74 (1867).

(*m*) *Robinson v. Blundell*, Mac. (N.Z.) 683 (1867); and see 62 Vic. No. 38 (N.Z.), sec. 147.

(*n*) *Raleigh v. Martin*, *Argus*, April 5, 1861.

Bk. I, Ch. V, Sec. 11. spectively of any former title, but is subject to all the liabilities, as it confers all the privileges, of a new title (o).

(b) What will Constitute Forfeiture.

Forfeiture.

Forfeiture of a claim can only be enforced by suit in the Court of Mines or before the Warden, who alone determine whether the alleged forfeiture has been incurred. A claim alleged to be forfeited cannot, as in the case of a claim abandoned *de facto*, be taken possession of as unoccupied land without an adjudication of possession.

Critchley v. Graham.

Under the Act No. 32, sec. 77, it was decided in the case of *Critchley v. Graham* that before miners could avail themselves of a forfeiture or a constructive abandonment of a claim in the actual possession of other miners they were bound first to obtain the adjudication of the Warden on the subject (a); and section 135 of the Act No. 1120 is not distinguishable from the section under which *Critchley v. Graham* was decided as to giving possession by the Court of Mines, and section 216 gives the same power to the Warden (b).

When the principle applies.

The same principle applies to persons in actual occupation of a claim, though the possession be irregular (c); and to a claim taken up under a by-law which is *ultra vires* (d); and to a residence area held under *The Residence Areas Act 1881* (e), even though it be held only under a claim of right (f); and to a person seeking to deprive miners in possession of ground in excess of that which is permitted by the by-laws (g).

(o) *Rendall v. Hadley*, 2 V.R. (M.) 21; 2 A.J.R. 105 (1871).

(a) *Critchley v. Graham* (2), 2 W. & W. (L.) 211 (1863).

(b) *Barlow v. Hayes*, 4 W.W. & A'B. (M.) 67 (1867); *Warrior G.M. Co. v. Cotter*, 3 W.W. & A'B. (M.) 81 (1866).

(c) *Barker's G.M. Co. v. Keating*, 1 V.R. (M.) 18; 1 A.J.R. 55 (1870).

(d) *Bottrell v. Waverley Co.*, 2

V.R. (M.) 16; 2 A.J.R. 133 (1871).

(e) 45 Vic. No. 709, sec. 7 (No. 1120, sec. 32); *Reid v. Gunn*, 13 V.L.R. 723 (1887); and see Act No. 1514, sec. 17.

(f) *Fancy v. Billing*, 7 V.L.R. (M.) 13; 3 A.L.T. 17 (1881).

(g) *Barlow v. Hayes*, 4 W.W. & A'B. (M.) 67 (1867); and see 62 Vic. No. 38 (N.Z.), sec. 149.

The dictum of *Critchley v. Graham* is paramount to by-laws (*h*), and what has been happily termed the peace-preserving policy of this decision has found its way into subsequent mining legislation and all the by-laws, and may be regarded as one of the strongest foundations of our mining law.

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Paramount to
by-laws.

But the principle of *Critchley v. Graham* will not apply in a contest between a mere intruder and a person who asserts that he is the first and actual holder, for it would be manifestly unjust to require a claimholder who held under a good title to take proceedings against any unwarranted trespasser who chose to intrude on him, in order to assert his title (*i*). Nor will the principle apply where a mining lease has expired by effluxion of time, for in such a case the former (leasehold) title is gone, and the land which was held under it is Crown land without a legal occupier (*j*); though the principle would apply in a contest between two persons who had marked out previous to the expiration of a lease (*k*). Neither will the principle apply in a case where the claim is actually abandoned (*l*), for if a claim is relinquished *de facto*, with no possible expectation of the former occupier ever coming back to it, such claim is then open to any holder of a miner's right, without the necessity of the Warden's adjudication to put him in possession of it (*m*).

Where the
principle does
not apply.

Another case which has become a leading case in mining law is *Coles v. Sparta* (*n*), as formulating the dictum that work done on a claim after a forfeiture has been incurred will not cure the forfeiture. In this case, where a claimholder did not actually abandon his claim, but ceased working on it, whereby it became liable to be forfeited under the by-laws, and subsequently, without re-marking

Coles v. Sparta.

(*h*) *Barlow v. Hayes*, *supra*.

(*i*) *In re Drummond*, *ex parte Dunbar*, 2 W. & W. (L.) 280 (1865); *Hunter v. Aratraveldt*, 3 W.W. & A'B. (M.) 59 (1866).

(*j*) *Durant v. Jackson*, 1 V.L.R. (M.) 6 (1875).

(*k*) *Cooper v. White*, 4 V.L.R.

(M.) 10 (1878).

(*l*) *Collins v. O'Dwyer*, 5 W.W. & A'B. (M.) 30 (1868); *Warrrior G.M. Co. v. Cotter*, 3 W.W. & A'B. (M.) 81 (1866).

(*m*) See *ante*, Sec. I, "ACTUAL OR INTENTIONAL ABANDONMENT."

(*n*) 3 W.W. & A'B. (M.) 21 (1866).

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the claim, the claimholder re-entered and resumed work upon it as if no forfeiture had been incurred, it was held that the subsequent work did not cure the forfeiture previously incurred, irrespective of the question of the necessity of stirring old pegs on claiming to hold old ground under a new title.

Forfeiture
cured by
resumption of
work.

But where a by-law enacts a limitation of the time for enforcing forfeiture, in such a case (*o*) a claimholder resuming the proper working of his claim within the prescribed time will cure his liability for the previous forfeiture for non-working (*p*); and non-compliance with a regulation (New Zealand) prescribing the annual renewal of certificates of registration will not necessarily work a forfeiture (*q*).

Flooding of
mine.

If, however, a by-law requires work to be resumed within a stated time after the expiration of a period of protection registration, and enacts that otherwise such claim shall be liable to forfeiture (*r*), and a claimholder is prevented from resuming work by reason of his claim being flooded, a forfeiture will nevertheless be incurred, even though the claim could not be drained except at an enormous expense, and the maxim *actus Dei nemini facit injuriam* will not apply (*s*). And a second certificate of suspension from work, or protection registration, will not cure a forfeiture incurred during the period of the first certificate of suspension, the conditions of which have not been complied with (*t*).

Protection
registration.

The mere obtaining of a certificate of protection registration will not cure a forfeiture already incurred, for a suspension certificate does not amount positively to a constructive working of the claim during the period of suspension so as to cure a previous forfeiture for non-work-

(*o*) Gippsland By-laws, No. VII, XII, March 9, 1883.

(*p*) *Hunter v. McNulty*, 13 V.L.R. 416; 9 A.L.T. 33 (1887).

(*q*) *Woodward v. Earle*, 2 N.Z. J.R. 12 (1874).

(*r*) Maryborough By-laws, Aug. 26, 1834, cl. 116.

(*s*) *Duffy v. Tait*, 4 W.W. & A'B. (M.) 17 (1867); see *O'Sullivan v. Mysterious Q.M. Co.*, 1 V.R. (M.) 4; 1 A.J.R. 13 (1870).

(*t*) *Tait v. Henderson*, Ch. Ct. of Mines, March 11, 1867; *Argus*, March 12, 1867.

ing (*u*), where a limitation of time for enforcing the forfeiture is prescribed by the by-laws (*v*); the protection registration would not in such a case be equivalent to a resumption of work. And where no time is prescribed for enforcing forfeiture, *Coles v. Sparta* will apply, so as to render protection registration altogether useless to cure the previous forfeiture.

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A collusive recovery before the Warden for forfeiture will not form a new title to the claim so recovered so as to cure a forfeiture previously incurred, though the claimholder acquiescing in such collusive recovery will be deemed by such recovery to have abandoned his previous title (*w*). "In the case of claimholders having committed a forfeiture, and subject to eviction by an informer, I do not think a collusive recovery by a friend undertaking to hold as a trustee should be allowed to form a new title for the defaulter" (*x*).

Collusive
recovery.

Working on other land adjoining the claim alleged to be forfeited may be working to save a forfeiture of a claim, if done with a decided intention to mine the claim, and with as great rapidity as to result as working on the claim itself might reasonably have (*y*); though this principle applies only where the adjoining lands are the property of the same owner, and cannot be taken advantage of where the lands belong to different owners, even with a prospective contingent arrangement for their eventually becoming the property of the same owner (*z*).

Working from
adjoining land.

It is not necessary that the work done shall be actual digging in the mine; any *bonâ fide* work performed for the purpose of winning the gold will be sufficient to save a forfeiture. Thus, where a by-law provided that pumping out water should be a protection to a claim from forfeiture for

Working to be
bonâ fide.

(*u*) *Hunter v. McNulty*, 13 V.L.R. 416; 9 A.L.T. 33 (1887).

(*v*) Gippsland By-laws, No. VII, XII, March 9, 1883.

(*w*) *Moore v. White*, 4 A.J.R. 17 (1873).

(*x*) *Per Molesworth*, Chief Judge,

Reardon v. Sayers, 3 V.R. (M.) 19; 3 A.J.R. 126 (1872).

(*y*) *Clerk v. Wrigley*, 4 W.W. & A'B. (M.) 74 (1867); *Sichel v. Pearce*, Sp. Ct. Vic., Sep. 11, 1861.

(*z*) *Schonfeldt v. Beel*, 1 V.L.R. (M.) 1 (1875).

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non-working (*a*), it was held that pumping with a *bonâ fide* design of reaching and working at earth within the claim would be considered as working it (*b*).

Insufficient
number of
men.

An altogether different ground of forfeiture is where a party of claimholders do not altogether neglect to work, but continue work on the claim with a lesser number of men than are required to be employed under the by-laws. A by-law which positively requires a certain number of men to be employed according to the size of the claim in effect says negatively that not less than that number of men shall be employed (*c*). Thus, where a by-law required a certain number of men to be employed in proportion to the area occupied (*d*), and the claimholders, finding they could not keep down the water, knocked off some of the men and employed a horse, and took steps to erect machinery but did not erect it, it was held that the non-compliance with the by-laws, however occasioned, rendered the claim liable to forfeiture (*e*); for though protection registration may be obtained under the by-laws pending the erection of machinery, yet machinery will not be considered in lieu of labor until it is erected (*f*); and the mere drawing of water at the expense of an adjoining mine, or burning on the claim quartz belonging to other persons, and not for the purpose of extracting minerals from the claim in dispute, will not be regarded as working the claim so as to save a forfeiture (*g*).

Machinery in
lieu of labor.

Money expended
on claim.

Under by-laws so enacting money laid out on a claim may, however, protect the claim from forfeiture for non-working as against the parties expending such money, though not as against parties who obtained possession of the claim as by forfeiture by means of collusive proceed-

(*a*) Castlemaine By-law, No. XII, sec. 8, Aug. 18, 1863.

(*b*) *Longbottom v. White*, 3 W.W. & A'B. (M.) 35 (1866).

(*c*) *Hunter v. McNulty*, 13 V.L.R. 416; 9 A.L.T. 33 (1887).

(*d*) Sandhurst By-law, No. VIII, sec. IV, cl. 5, Oct. 21, 1870.

(*e*) *Davis v. Bull*, 3 V.R. (L.) 138; 3 A.J.R. 66 (1872); *Christian v. Kenworthy*, 3 W.W. & A'B. (M.) 11 (1866).

(*f*) *Coles v. Sparta*, 3 W.W. & A'B. (M.) 21 (1866).

(*g*) *Longbottom v. White*, 3 W.W. & A'B. (M.) 35 (1866).

ings (*h*); and where a by-law imposes an obligation to advance a main drive (*i*), this amounts to a duty imposed by the by-law, and a mere breach of such duty, as delay in advancing the drive, is not a ground of forfeiture (*j*).

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A certificate of protection registration properly obtained (*k*) will save a forfeiture for non-working during the period of protection, but it will be of no avail where the certificate has been obtained by false representations (*l*); and if obtained in contravention of the by-laws it is a nullity, and is no protection from forfeiture during its currency (*m*); so, a certificate of protection registration granted on a verbal application, where the by-laws require the application to be in writing (*n*) is ineffectual as an excuse for non-working (*o*); but parties obtaining protection registration for the purpose of forming a company, and failing to do so within the period of protection, do not thereby forfeit their claim (*p*); and as a certificate of registration is voidable only, and not void *ab initio* (*q*), a claimholder whose certificate of protection registration is assailed cannot be dispossessed except by legal process, according to the doctrine of *Critchley v. Graham* (*r*); and a claimholder merely neglecting to procure and post a certificate of protection registration on his claim, as required by the by-laws, does not by such neglect deprive himself of the benefit of the protection of his claim, or render it liable to forfeiture for non-working (*s*).

Effect of
protection
registration.

Using a shaft on a claim for a well for domestic purposes is not *bonâ fide* using it as a mine so as to save forfeiture (*t*); and amalgamation of a claim liable to forfeiture with

Using shaft as a
well.

(*h*) *Moore v. White*, 4 A.J.R. 17 (1873).

(*i*) Ballarat By-law, No. III, sec. 14, June 15, 1858.

(*j*) *United Extended Band of Hope Co. v. Tennant*, 3 W.W. & A'B. (M.) 41 (1866).

(*k*) Ballarat By-law, No. XI, cl. 4, Oct. 23, 1873.

(*l*) *Seal v. Bebro*, 5 V.L.R. (M.) 4; 1 A.L.T. 47 (1879).

(*m*) *M'Grath v. Wilson*, 19 A.L.T. 251 (1898).

(*n*) Maryborough By-law No. 76, Sept. 13, 1866.

(*o*) *Brabender v. Gibbs*, 6 W.W. & A'B. (M.) 62; N.C. 71 (1869).

(*p*) *Kilgour v. Flinn*, 5 W.W. & A'B. (M.) 32 (1868).

(*q*) *Butler v. O'Keefe*, 3 W.W. & A'B. (M.) 16 (1866).

(*r*) 2 W. & W. (L.) 211 (1863).

(*s*) *Weddell v. Howse* (1), 8 V.L.R. (M.) 44; 4 A.L.T. 95 (1882).

(*t*) *Loughbottom v. White*, 3 W.W. & A'B. (M.) 35 (1866).

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Amalgamation.

other ground legally held will not cure a forfeiture, even though since the amalgamation such work has been done as would save the amalgamated claim as an entire claim from forfeiture (*u*).

Taking too much ground.

But taking more ground than the by-laws permit to be taken does not work a forfeiture of the whole claim taken up; it subjects it only to reduction to the proper area (*v*).

Re-pegging.

Re-pegging a claim, not followed by registration of it, will not redeem or revive a title to a claim liable to forfeiture (*w*); in fact, such pegging may be regarded as an abandonment of any former pegging, and probably of the previous title to the claim, irrespective of the question raised in *Coles v. Sparta*, but not decided in that case, as to whether a claimholder whose claim was liable to be forfeited could form a new title for himself by shifting his pegs and re-registering his claim; for no one has a right to hold simultaneously two claims on the same space under distinct titles. The acquisition of a later right is a merger of former rights (*x*).

Application for lease.

An application for a lease by a claimholder is no protection from forfeiture otherwise incurred, either before or after such application (*y*), though no person is permitted to mark out as a claim any land applied for as a lease pending the application (*z*), and the pendency of the application for the lease will debar the Warden from putting any one in possession of the ground (*a*). The protection afforded by the application is, however, merely *quoad* the applicant for the lease, and if the lease is refused it is just the same as if the application had not been made (*b*).

(*u*) *Clerk v. Wrigley*, 4 W.W. & A'B. (M.) 74 (1867), according to the principle of *Coles v. Sparta*, 3 W.W. & A'B. (M.) 21 (1866).

(*v*) *Mulcahy v. Walhalla Co.*, 5 W.W. & A'B. (E.) 103 (1868); *Bryson v. McCarthy*, 6 W.W. & A'B. (M.) 35; N.C. 18 (1869); and see 62 Vic. No. 38 (N.Z.), sec. 149.

(*w*) *O'Sullivan v. Clarke*, Ch. Ct. of Mines, Dec. 1, 1868; *Argus*, Dec. 2, 1868.

(*x*) *United Extended Band of Hope Co. v. Tennant*, 3 W.W. & A'B. (M.) 41 (1866); *Great North West Co. v. Sayers*, 4 W.W. & A'B. (M.) 64 (1867).

(*y*) *Smith v. Golden Gate Co.*, 5 W.W. & A'B. (M.) 5 (1868).

(*z*) Act No. 1120, secs. 70, 71, 72.

(*a*) *Hutcheson v. Erk*, 3 V.L.R. (M.) 1 (1887).

(*b*) *Barker's G.M. Co. v. Keating*, 1 V.R. (M.) 18; 1 A.J.R. 55 (1870).

The Act No. 1120, secs. 65, 70, prohibits any person trespassing on the surface of land subject of an application for a lease, pending such application, for the purpose of marking it out as a claim; but though a person may not acquire a claim pending the application for a lease, yet he may, without marking out, proceed before the Warden for forfeiture of the claim, and though the Warden cannot declare the land forfeited and put the complainant in possession, unless default in the application be shown (c), pending the application for the lease, yet he may adjourn the case from time to time until the application for the lease is decided, and if the lease is refused he can then order forfeiture of the claim and put the complainant in possession (d); and a lease executed by the lessee after the expiry of the time prescribed by the leasing regulations (e) is not a valid lease, and is no defence against a claimant for forfeiture and possession before the Warden after such lapse and before such execution (f).

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Proceeding for
forfeiture pending
application
for lease.

Irregular
execution of
lease

Where two persons are registered for the same claim by mistake of the mining registrar, and the later registered holder forfeits his claim by leaving it unworked, a party who obtains a declaration of forfeiture from the Warden against such later holder, and an order that he should deliver possession, cannot take possession of the claim as against the person who had been first registered, without giving notice to him, and obtaining a declaration of abandonment as against such first owner from the Warden (g).

Registration by
mistake.

(c) Illegal Occupation.

In addition to the liability a claimholder incurs of forfeiting his claim for not properly working it under the by-laws,

Definition.

(c) *Antony v. Dillon*, 15 V.L.R. 240; 10 A.L.T. 231 (1889).

(d) *Hutcheson v. Erk*, 3 V.L.R. (M.) 1 (1877); *Constable v. Pigtail Q.M. Co.*, 3 V.L.R. (M.) 7 (1877).

(e) See Regulations relating to Mining Leases, Oct. 8, 1897, cl. 32.

(f) *Finnegan v. Wissing*, 4 A.J.R. 65 (1873); some doubt has, how-

ever, been thrown upon this decision; *Cock v. Stawell Amalgamated Scotchman's and Cross Reefs Q.M. Co.*, 24 V.L.R. 165; 4 A.L.R. 219; 20 A.L.T. 85 (1898). See *post*, Bk. II, "INTERESTS IN GOLD MINING LEASES."

(g) *Hunter v. Aratraveldt*, 3 W. & A'B. (M.) 59 (1866).

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a claim may be lost by being unlawfully occupied by the person in possession of it, as, for example, if he should fail to renew his miner's right, and should retain possession of his claim after the term of his miner's right has expired; or if there be any defect in the title arising from incorrect pegging, or taking up, or registration, or other neglect in complying with the by-laws; or if he shall have entered into possession of more ground than is permitted by the by-laws; in which cases he is regarded as being in unlawful possession of the claim or the excess area. This is known as illegal occupation. Illegal occupation may result from an infinite number of acts or omissions, and though it is not defined by the *Mines Acts* it is somewhat akin to forfeiture, and proceedings may be taken before the Warden in a similar manner as for forfeiture to obtain possession of land in the illegal occupation of the holder.

Evidence of.

In a suit for possession by reason of illegal occupation of a claim the claimholder must defend his title, whatever it may be, and it is not for the complainant to prove the default. Thus, in a suit to obtain possession of a claim on the ground that the defendant is in unlawful occupation, not being in possession of a miner's right in force, the onus is cast upon the defendant to show that he had a miner's right in force at the commencement of the suit (a); but when the defence to a suit for being in illegal occupation of a claim was "priority of legal occupation for mining purposes under the by-laws," the defendant was permitted to show title by possession, although such title was not a legal one under the by-laws (b).

Taking too much ground.

Persons marking out and taking up more ground than is allowed by the by-laws, are in illegal occupation of the excess area over and above that permitted to be taken up, but such occupation of an excess area will not work a forfeiture of the whole (c); and where five persons are alleged

(a) *Lennox v. Golden Fleece and Heales Co.*, 5 A.J.R. 18 (1874).

(b) *Barker's G.M. Co. v. Keating*, 1 V.R. (M.) 18; 1 A.J.R. 55 (1870).

(c) *Oxley v. Little*, 5 W.W. & A'B. (M.) 14 (1868); *Bryson v. McCarthy*, 6 W.W. & A'B. (M.) 35; N.C. 18 (1869); *Mulcahy v. Wal-*

to be in illegal occupation of more ground than they are entitled to under the by-laws, and five other persons holding miners' rights apply jointly to be put in possession of the ground, the Warden has jurisdiction to entertain the application and put the complainants in possession, and no previous marking out of the claim is required (*d*).

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The termination before commencement of suit of the miner's right under which the defendant had previously held his claim may determine the defendant's interest in the claim as against the complainant, unless the miner's right be renewed (*e*); that is, it becomes voidable during the period for which he has no miner's right (*f*).

Termination of
miner's right.

In a suit seeking to be put in possession of land alleged to be in the illegal occupation of another, it is necessary to show on the face of the summons what comprises the alleged illegal occupation; a summons drawn merely for being in illegal occupation of a claim, without showing in some degree the objection to the defendant's title, is too vague, and should be amended. The defendant is entitled to know in what respect his title is assailed, and unless the summons be amended to show this it should be dismissed (*g*).

Illegality to be
shown on
summons.

(*d*) Means of Enforcing Forfeiture.

As has already been shown, a person wishing to avail himself of the forfeiture of a claim in the actual possession of another has no right to take forcible possession of such claim, or to mark it out as virgin ground, but must proceed in the ordinary course of law and obtain the adjudication of the Warden in his favor (*a*).

*Critchley v.
Graham.*

But the authority of *Critchley v. Graham* does not apply in every case where a person has been in possession. It

Persons having
primâ facie
title.

halla Co., 5 W.W. & A'B. (E.) 103 (1868).

(*d*) *Barlow v. Hayes*, 4 W.W. & A'B. (M.) 67 (1867).

(*e*) *Lennox v. Golden Fleece and Heales Co.*, 5 A.J.R. 18 (1874).

(*f*) *Vial v. Allender*, 23 V.L.R.

516; 19 A.L.T. 161; 4 A.L.R. 17 (1898).

(*g*) *Barton v. Band of Hope and Albion Consols* (1), 5 V.L.R. (M.) 18; 1 A.L.T. 30 (1879).

(*a*) *Critchley v. Graham* (2), 2 W. & W. (L.) 211 (1863).

Bk. I. Ch. V. Sec. II. does not mean that in every case where a person was in possession a miner seeking to avail himself of a forfeiture must first go before the Warden before he can mark out. It applies only where the person in possession has a strong *prima facie* title (*b*).

Procedure. Proceedings to enforce forfeiture may be taken in the Court of Mines (*c*) or before the Warden (*d*), as the Act under which *Critchley v. Graham* was decided (*e*) is not in this respect distinguishable from the Act No. 1120, Part I (*f*).

Abandonment. However, as before mentioned, this principle will not apply to cases of actual abandonment. The title to a claim is based on possession, and a right originating in possession terminates with the cesser of possession (*g*). Where there is a *de facto* abandonment there is no necessity for the Warden's adjudication; it is only in cases of constructive abandonment and forfeiture, whether by illegal occupation or otherwise, that the principle of *Critchley v. Graham* applies (*h*).

Right to enforce forfeiture. The right to enforce forfeiture is a public right belonging to no particular individual until he has proceeded in a proper court to enforce his share of it to which his title then first accrued, and which he could enforce subject to the condition of then holding a miner's right (*i*). Any holder of a miner's right may institute proceedings for forfeiture, and the Warden has power to decree that forfeiture shall enure for the benefit of the complainant (*j*).

Miner's right. But it is not necessary that a person seeking to enforce

(*b*) *Antony v. Dillon*, 15 V.L.R. 240; 10 A.L.T. 231 (1889).

(*c*) Act No. 1120, sec. 135.

(*d*) *Ibid.*, sec. 216.

(*e*) Act No. 32, *The Goldfields Act* 1857.

(*f*) *Barlow v. Hayes*, 4 W.W. & A'B. (M.) 67 (1867).

(*g*) *Warrior G.M. Co. v. Cotter*, 3 W.W. & A'B. (M.) 81 (1866); *Coles v. Sparta*, 3 W.W. & A'B. (M.) 21 (1866).

(*h*) *Collins v. O'Dwyer*, 5 W.W. & A'B. (M.) 30 (1868); *Mulcahy v. Walthalla Co.*, 5 W.W. & A'B. (E.) 103 (1868); on appeal to Privy Council, 40 L.J.P.C. 41; 2 A.J.R. 93 (1871).

(*i*) *United Extended Band of Hope Co. v. Doyle*, 5 W.W. & A'B. (M.) 39 (1868); see Act No. 1120, sec. 298.

(*j*) *Ching Tong Fong v. Lee Chung*, 1 N.Z.J.R. 139 (1873).

forfeiture should have a miner's right at the time when the forfeiture was incurred; it is sufficient if he has one when the complaint is made (*k*). Neither is it necessary that he should hold a miner's right before the repeal of a by-law under which the breach causing forfeiture was incurred, provided he is the holder of a miner's right when he seeks to enforce the forfeiture (*l*). After the repeal of a by-law, however, the question of alleged subsequent forfeiture of a claim must be determined according to the by-law under which the claim was registered, notwithstanding its subsequent repeal (*m*).

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Repeal of
by-law.

A person holding a full claim under one miner's right need not have a second miner's right (*n*) to enable him to enforce forfeiture of another claim (*o*), as the by-laws in question authorise the holder of one miner's right to take up several single men's claims under it.

Second miner's
right.

It is imperative on the Warden in cases of forfeiture, and in all cases under the Act No. 1120, sec. 237, in which he finds the complainant to be entitled as against the defendant, to make an order putting the complainant in possession (*p*). He has no discretion in the matter, and his adjudication of forfeiture or abandonment will enure only to the party in whose favor it is made, and it cannot be taken advantage of by others (*q*).

Duty of Warden.

A person obtaining a decree of forfeiture of the claim of another on the ground of non-compliance with the by-laws does not, however, thereby acquire a title for himself, but merely removes a prior title; and therefore in taking possession under the Warden's order he must comply with the ordinary preliminary conditions of marking out under the by-laws if he would acquire a title for himself to the

Effect of
Warden's
adjudication.

(*k*) *Clerk v. Wrigley*, 4 W.W. & A'B. (M.) 74 (1867).

(*l*) *United Extended Band of Hope Co. v. Doyle*, 5 W.W. & A'B. (M.) 39 (1868).

(*m*) *Reg. v. Clow, ex parte Oliver*, 5 W.W. & A'B. (L.) 89 (1868), following *Clerk v. Wrigley, supra*.

(*n*) Sandhurst By-law No. VII, sec. V, cl. 3.

(*o*) *Crocker v. Wigg*, 5 W.W. & A'B. (M.) 20 (1868).

(*p*) *Reg. v. Orme, ex parte Droscher*, 3 V.L.R. (L.) 343 (1877); see Act No. 1120, sec. 237.

(*q*) *Critchley v. Graham* (2), 2 W.

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land of which he has been put in possession. Persons proceeding for forfeiture may not be entitled to take all the forfeited land; they establish a right for the public, and may then help themselves to so much as they are entitled to, and not necessarily the entire claim (*r*). But this proceeding is not necessary if the by-laws under which the claim is so acquired dispense with such preliminary conditions, and authorise registration of the claim forthwith after adjudication (*s*). And on the same principle a person obtaining an adjudication of forfeiture and possession has priority of title in pursuance of such adjudication, if he proceeds to obtain possession by marking and registration of the claim (*t*).

Adjudication enures only to complainant.

Thus, a third person, or a defendant whose title has been defeated, cannot by prior marking immediately after the Warden's adjudication in favor of a complainant, obtain legal possession of a claim as against the complainant by reason of such marking. The priority of title enures to the complainant in whose favor the adjudication was made, and is a valid title as soon as he has marked out and registered the claim; and a stranger or the defendant cannot fly in the face of the Warden's order and obtain title by marking out immediately the prior titles have been cleared away by the Warden's order, and before the complainant who has obtained the order has had an opportunity of taking advantage of it by marking out (*u*).

Where by-law repealed.

Where at the time of the repeal of a by-law (Ballarat by-law No. 14) a claim held under it was liable to forfeiture for a breach of that by-law theretofore committed, and the repealing by-law only expressly saved the rights of all persons obtained previous to and held at the time of the

& W. (L.) 211 (1863); *Ching Tong Fong v. Lee Chung*, *supra*.

(*r*) *Moore v. White*, 4 A.J.R. 17 (1873); *Beavan v. Rigby*, 2 V.L.R. (M.) 7 (1876); *Sayers v. Jacomb*, 3 V.R. (L.) 132; 3 A.J.R. 66 (1872); see, however, *Coates v. South Loch Fyne G.M. Co.* (2), 25 V.L.R. 543; 6 A.L.R. 62 (1900), where this point is discussed.

(*s*) *Barton v. Band of Hope and Albion Consols* (3), 6 V.L.R. (M.) 1; 1 A.L.T. 145 (1880).

(*t*) *Keast v. D'Angri*, 4 A.J.R. 61 (1873).

(*u*) *White v. Perriam*, 5 V.L.R. (M.) 31; 1 A.L.T. 95 (1879); *Coates v. South Loch Fyne G.M. Co.*, *supra*.

repealing by-law coming into force, it was held that proceedings for forfeiture for the breach in question would lie, notwithstanding the repeal of the by-law (*v*).

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And proceedings may be taken and forfeiture declared after the neglect or omission which has caused the forfeiture has ceased, notwithstanding the claimholder may have resumed work on the claim (*w*).

After work resumed.

The persons by whom and the manner in which a forfeiture may be taken advantage of are to be determined by the by-laws in existence at the time the forfeiture is attempted to be enforced (*x*); and if a by-law enacts a forfeiture, but omits to point out the person who may enforce it, such forfeiture may be enforced by any holder of a miner's right (*y*). And where a by-law (*z*) provides that a claim shall be forfeitable for non-working, and that it may be by a competent court declared forfeited, the Warden has no discretionary power to refrain from ordering forfeiture and putting the complainant in possession, should the circumstances appear to him sufficient to warrant such a decision as being equitable, as he is the person having jurisdiction by law in the matter, and as *persona designata* need not be specially mentioned in the by-law (*a*).

By whom forfeiture may be enforced.

Forfeiture of a claim is not confined to the interest under the then existing miner's right, as the title is in the nature of a permanent estate, and such title is dependent for its continuance on the renewal of the miner's right (*b*).

Existing miner's right.

A person establishing a forfeiture does not necessarily take the same claim as the person whose title he impugns; in some classes of claims he might not be entitled to as much

What claim taken on forfeiture.

(*v*) *United Extended Band of Hope Co. v. Doyle*, 5 W.W. & A'B. (M.) 39 (1868).

(*w*) *Clerk v. Wrigley*, 4 W.W. & A'B. (M.) 74 (1867); *Coles v. Sparta*, 3 W.W. & A'B. (M.) 21 (1866).

(*x*) *Mitten v. Spargo*, 1 A.J.R. 69 (1870); *Reg. v. Clow, ex parte Oliver*, 5 W.W. & A'B. (M.) 89 (1868).

(*y*) *Oxley v. Little*, 5 W.W. & A'B. (M.) 14 (1868); *Ching Tong Fong v. Lee Chung*, 1 N.Z.J.R. 139 (1873).

(*z*) Castlemaine By-law, No. VI, sec. 7.

(*a*) *Lawlor v. Stiggants*, 2 V.L.R. (M.) 17 (1876).

(*b*) *Clerk v. Wrigley*, 4 W.W. & A'B. (M.) 74 (1867).

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land, or he might wish to include in his claim the former, and some previously unoccupied, ground (*c*). He may desire to take a lesser area, or to include in his claim some additional ground, and he is entitled to occupy other adjoining ground together with the claim adjudged forfeited, if the whole area taken is not in excess of that allowed by the by-laws (*d*). But a person taking possession under the Warden's adjudication of forfeiture of more ground than he is entitled to occupy may be limited to his proper quantity by the Warden's order, and his entire title will not be avoided by the excess (*e*). This, however, was an opinion expressed by Molesworth, Chief Judge, where the facts of the case did not raise the point, and it was not discussed (*f*).

Marking for
lease.

A person who obtains an order of forfeiture succeeds to the title which the defendant had immediately before the claim became forfeited, and such title cannot be defeated by a third party, or *à fortiori* by the defendant himself, by the marking out of the ground for a lease after the complainant has once begun to assert his title (*g*).

Effect of appeal.

Pendency of an appeal against the Warden's dismissal of a complaint for forfeiture will not affect proceedings to obtain a declaration of forfeiture taken by a third party pending the appeal (*h*); and pendency of an application for a lease does not prevent the Warden from making an order for possession in favor of the complainant of the land included in such application, should he declare the claim forfeited, leaving the complainant to meet the liabilities of the Act No. 1120, sec. 70 (*i*). And although possession be

Application for
lease.

(*c*) *Bearan v. Rigby*, 2 V.L.R. (M.) 7 (1876).

(*d*) *Bryson v. M'Carthy*, 6 W.W. & A'B. (M.) 35; N.C. 18 (1869).

(*e*) *Oxley v. Little*, 5 W.W. & A'B. (M.) 14 (1868).

(*f*) See *Bryson v. M'Carthy*, *supra*; *Mulcahy v. Walhalla Co.*, 5 W.W. & A'B. (E.) 103 (1868.)

(*g*) *Coates v. South Loch Fyne G.M. Co.* (2), 25 V.L.R. 543; 6 A.L.R. 62 (1900).

(*h*) *O'Sullivan v. Mysterious Q.M.*

Co., 1 V.R. (M.) 4; 1 A.J.R. 13 (1870).

(*i*) *Jolly v. Stephens*, 5 A.J.R. 169 (1874); *Reg. v. Orme, ex parte Droscher*, 3 V.L.R. (L.) 343 (1877); *Perkins v. Hercules G.M. Co.*, 5 W.W. & A'B. (M.) 48 (1868); *Barker's G.M. Co. v. Keating*, 1 V.R. (M.) 18; 1 A.J.R. 55 (1870); *Hutcheson v. Erk*, 3 V.L.R. (M.) 1 (1877); *Constable v. Pigtail Q.M. Co.*, 3 V.L.R. (M.) 7 (1876); *Antony v. Dillon*, 15 V.L.R. 240; 10 A.L.T.

not recovered by the Crown of land the lease of which has been declared void under the leasing regulations, the holder of a miner's right may proceed before the Warden, and upon due proof given by him of the forfeiture of the lease he will be entitled to an adjudication of forfeiture (*j*).

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A shareholder or director in an incorporated company is not precluded from enforcing forfeiture of a claim incurred by the company for breach of the by-laws (*k*); and a director of a company, whilst acting as a director, acquiring the knowledge of the defendant's want of a miner's right, is not estopped by his position as a director from enjoying the same privileges as the rest of the public have, after he has ceased to be a director and has severed his connection with the company (*l*). "We cannot say that any principle of equity is actually violated by one of several shareholders endeavoring to forfeit for his own personal benefit a mine the working whereof formed the subject matter of an association" (*m*).

Forfeiture
enforced by
shareholder or
director.

If, however, a proceeding for forfeiture be in fact taken at the joint expense and for the joint benefit of the complainant and another person, the proceedings will be bad on the ground of champerty, though the other person may be a general mining partner of the complainant (*n*). In order to support a defence founded on champerty it must be shown that the right which the plaintiff is seeking to enforce is founded upon an agreement for maintenance or champerty, no matter with whom made (*o*); but holding any interest in the matter at variance is sufficient to support an agreement

Champerty and
maintenance.

231 (1889); and see *post*, Bk. II, Ch. II, "APPLICATION FOR GOLD MINING LEASES."

(*j*) *Per* Higinbotham, J., in *Barwick v. Duchess of Edinburgh Co.*, 8 V.L.R. (E.) 70; 3 A.L.T. 68, 121 (1882); *McMillan v. Dillon*, 6 V.L.R. (M.) 15; 1 A.L.T. 203 (1880), explained in *Ives v. Lalor*, 13 V.L.R. 941; 9 A.L.T. 98 (1887).

(*k*) *Smith v. Golden Gate Co.*, 5 W.W. & A'B. (M.) 5 (1868).

(*l*) *Lennox v. Golden Fleece Co.*, 4 A.J.R. 154 (1873).

(*m*) *Per* Stawell, C.J., in *Harri-son v. Smith*, 6 W.W. & A'B. (E.) 182 (1869), on appeal to the Full Court; for appeal to Privy Council see 3 A.J.R. 44.

(*n*) *Hunter v. M^cNulty*, 13 V.L.R. 416; 9 A.L.T. 33 (1887), following *Mitten v. Spargo* and *Collins v. Hayes*, *infra*.

(*o*) *Carpenter v. Boyce*, 22 V.L.R. 248; 18 A.L.T. 91; 2 A.L.R. 239 (1896), following *Hayes v. Levinson*, 16 V.L.R. 305; 11 A.L.T. 180 (1890).

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alleged to be champertous. Thus, O granted to B a lease of certain coal mines under his land, in consideration of receiving a royalty on all coal raised. It was subsequently discovered that a company holding the adjoining land had removed a large portion of the coal from O's land, and had for a series of years taken O's coal by means of wilful and secret underground trespass. The lease was granted by O to B after the trespass had been committed but before it was discovered, and O had a claim against the company for damages for removal of the coal from his land. Thereupon B, on discovery of the trespass, agreed with O to indemnify him against the costs of the suit for damages, on the terms of receiving 92½ per cent. of the amount recovered. On appeal it was held, affirming the judgment of the Full Court, that such agreement was not void on the ground of champerty, as O had sufficient interest in the matter to support the agreement (p). Where, however, a complainant in a suit for forfeiture admitted on cross-examination that another person had joined with him in advancing money for the purpose of the suit, and was to have a share in the claim if recovered, it was held to present the objection of champerty and maintenance, and the suit was dismissed. "The plaintiff has no right except one which can be acquired by litigation, and the inception of that litigation was through a bargain contrary to public policy" (q).

Binding
contract not
necessary.

And it is not necessary in order to constitute champerty, that there should be a binding contract between the parties, which apart from its illegality would be valid. But where a plaintiff has a good title, he is not to be defeated on the ground merely of remunerating the attorney whom he employs; though where the plaintiffs' solicitor had paid the expenses of the suit, and taken out miners' rights, and was to have half of each of the plaintiffs' interest in the land when recovered, it was held that the proceedings were in their inception and concoction based upon champerty and

(p) *In re Bulli C.M. Co.*, 20 N.S. in *Mitten v. Spargo*, 1 V.R. (M.)
W.L.R. (E.) 91 (1899). 22; 1 A.J.R. 69 (1870).

(q) *Per Molesworth*, Ch. Judge,

maintenance, and the suit was dismissed (*r*). But when the complainants have a perfect legal right independent of any illegal arrangement with other parties, the defendant cannot defeat the complainant's legal claim by proof of such collateral agreement on the ground of champerty (*s*); and a shareholder in a registered company, who had forfeited his shares, was allowed to bear part of the expenses of a suit by another shareholder to have the forfeiture set aside (*t*).

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The by-laws in some cases of forfeiture followed by resumption of work permit of a fine being inflicted in lieu of forfeiture of the claim. The decision in *Coles v. Sparta* (*u*), rests upon the peculiar circumstances of the case (*v*); and in a case where early neglect was followed by zealous continuous work, or where the claimholder had fallen into technical errors only, it was held that a fine might properly be inflicted in lieu of forfeiture, though it would not be permitted where the claimholder had been guilty of aggravated neglect (*w*).

Fine in lieu
of forfeiture.

Forfeiture of a water right licence in New Zealand for non-user may be enforced by complaint before the Warden. Where the holder of a water right failed to use the water for mining purposes for a period of two months and a half, though work was done by him with a view to supplying a neighbouring town with water by means of his water right, and the original race was entirely disused and the water allowed to flow down its natural channel, it was held that work done for other than mining purposes would not be regarded as work done in connection with the water right, and that the Warden might decree forfeiture for non-user, but that a fine might be inflicted in lieu of forfeiture (*x*).

Forfeiture of
water right
licence.

A third person is not entitled to take up a claim as

Pending
decision on
special case.

(*r*) *Collins v. Hayes* (2), 6 W.W. & A'B. (M.) 5 (1869).

(*s*) *Carpenter v. Boyce*, *supra*; and see *Harney v. Minister of Mines*, 1 W.A.L.R. 146 (1899).

(*t*) *Wood v. Freehold United G.M. Co.*, 1 A.J.R. 173 (1870).

(*u*) 3 W.W. & A'B. (M.) 21 (1866).

(*v*) *Clerk v. Wrigley*, 4 W.W. &

A'B. (M.) 74 (1867).

(*w*) *Thompson v. Begg*, 2 V.R. (M.) 1; 2 A.J.R. 34 (1871). This is also permitted by the New Zealand Mining Act, 62 Vic. No. 38 (N.Z.), sec. 150.

(*x*) *Davis v. Robertson*, 1 N.Z. J.R. (N.S.) M.L. 36 (1873).

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abandoned pending the decision of the Supreme Court on a special case in respect of the same ground, for the inchoate rights of a complainant under a complaint for forfeiture are not to be obstructed by the right to have a special case reserved which is given by the Act No. 1120, sec. 265, to the defendant (*y*).

Summons for forfeiture.

A summons for forfeiture before the Warden must allege distinctly the grounds on which the forfeiture is sought, and the by-laws which have not been complied with (*z*), and the same principle applies to a summons for being in illegal occupation (*a*). The Warden has jurisdiction in all cases of forfeiture under the by-laws though he may not be named as the person to adjudge a forfeiture in the by-law under which the forfeiture is sought, as he is the proper officer to hear and determine the complaint, and derives his jurisdiction from the *Mines Acts* (*b*).

Jurisdiction of Warden.

Withdrawal of one complainant.

The withdrawal from the proceedings of one of a number of complainants does not defeat the others, and they may recover their share of the land as if there had been no such withdrawal (*c*).

Procedure and practice.

The subject of the jurisdiction of the Warden in cases of forfeiture, and of the procedure and practice in suits before him, is, however, more fully dealt with in a subsequent part of this work (*d*).

(*y*) *Harwood v. Beavan*, 2 V.L.R. (M.) 13 (1876).

(*z*) *Hooke v. Burke*, 4 A.J.R. 122 (1873).

(*a*) *Barton v. Band of Hope and Albion Consols* (1), 5 V.L.R. (M.) 18; 1 A.L.T. 30 (1879).

(*b*) *Longbottom v. White*, 3 W.W. & A'B. (M.) 35 (1866); *Lavelor v. Stiggants*, 2 V.L.R. (M.) 17 (1876).

(*c*) *Milne v. Morell*, 3 V.R. (M.) 4; 3 A.J.R. 21 (1872).

(*d*) See *post*, Bk. IV, Chap. II, "WARDENS OF THE GOLDFIELDS."

BOOK II.

INTERESTS IN GOLD MINING
LEASES.

CHAPTER I.

GOLD MINING LEASES.

SEC. I.—GOLD MINING LEASES OF
CROWN LANDS.

SEC. II.—TAILINGS.

SEC. III.—TRIBUTE AGREEMENTS.

SECTION I.—GOLD MINING LEASES OF CROWN LANDS.

ANY Crown land not already held under mining lease or miner's right or business licence may be applied for as a gold-mining lease, and the Crown may grant to any person or elective body corporate, subject to the *Mines Acts* and to the leasing regulations, a lease of such land, to be effectual for gold-mining on or below, or both on and below the

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Sec. I.
Leases may be
granted.

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Sec. 1.*

surface (*a*). An elective body corporate (*b*) does not mean any registered company or incorporated body, but a corporation created by registration under an Act relating to mining partnership associations or companies or shareholders thereof or under Part II of the *Companies Act* (*c*); and a trading company, though formed for mining purposes, is not a person or an elective body corporate under section 49 of the Act No. 1120 (*d*).

Land held under
miner's right.

A leaseholder in Queensland (*e*) was held to be entitled to mine under the surface of land occupied by the holder of a miner's right, who was registered for the land as the proprietor of a water right area (*f*).

In other States.

In South Australia the applicant for a lease must be the holder of a miner's right (*g*); so, in New South Wales (*h*); but not in the other States (*i*). Under the mining law of New Zealand (*j*) mining leases are not granted; all titles to mining property are of one class and are entitled "mining privileges," and licences for mining privileges comprise all mining interests.

Area to be
included in
lease.

The area, extent and form of the land included in a gold-mining lease are such as the Governor, on the recommendation of the Minister, may decide (*k*). Separate leases are not now issued for the various classes of land, and application may be made for a mining lease to include Crown land, reserved lands, and private land, or any of them, and the rent is adjusted according to the areas of the several classes of land included in the lease (*l*).

Lease not a
claim.

A gold-mining lease is not a claim (*m*); and the interpre-

(*a*) Act No. 1120, sec. 49.
 (*b*) See *Ibid*, sec. 50, for definition of "elective body corporate."
 (*c*) 54 Vic. No. 1074.
 (*d*) *Moe Coal M. Co. v. Lithgow*, 20 V. L. R. 80; 15 A. L. T. 222 (1894).
 (*e*) Under Act 38 Vic. No. 11 (Q.).
 (*f*) *Hall v. Gorrie*, 3 Q. L. J. 113 (1888).
 (*g*) 56 & 57 Vic. No. 587 (S.A.), sec. 51.
 (*h*) 37 Vic. No. 13 (N.S.W.), sec.

33.
 (*i*) 62 Vic. No. 16 (W.A.), sec. 16, and 59 Vic. No. 40 (W.A.), sec. 32; 57 Vic. No. 24 (Tas.), sec. 34; 62 Vic. No. 24 (Q.), sec. 24.
 (*j*) 62 Vic. No. 38 (N.Z.).
 (*k*) Regulations relating to mining leases, cl. 5.
 (*l*) Act No. 1514, sec. 29.
 (*m*) *Reg. v. Clow, ex parte Hewitt*, 2 W. & W. (L.) 160 (1863).

tation clause of the Act No. 1120 declares that a claim shall not include any land comprised in any lease granted for mining purposes (*n*). *Bk. II. Ch. I. Sec. 1.*

The title acquired by means of a gold-mining lease is separate and distinct from any other title, and is obtained only by application made for it under regulations made by the Governor-in-Council in pursuance of the *Mines Act* (*o*); and the granting or refusal of the lease is entirely in the discretion of the Governor (*p*). The holder of a gold lease in Tasmania (*q*), having obtained a permit to mine for gold on land of which a silver lease had been granted, was held to have a limited title, and could use his right only as long as the silver lessee was not interfered with (*r*). Title under lease.

The term of a gold-mining lease may not exceed fifteen years from the time of granting it (*s*), and so long as the covenants of such lease are complied with the lessee may enjoy the land and privileges demised during such term without interference. Term of lease.

The labor covenant of a gold-mining lease, *i.e.* the covenant by which the lessee binds himself to work the land *bonâ fide* for mining and to keep employed on the leased ground a certain number of men prescribed by the lease, is the real consideration given for the granting of such lease, for the rent is merely nominal; and therefore such covenant will be strictly construed. "The testing and opening of new ground by means of a stipulated amount of labor employed is the value given by the lessee to the Crown in return for the exclusive right to mine on a portion of the public lands supposed to be auriferous. This covenant, therefore, ought to be strictly construed, and a lessee has no ground of complaint if the performance of it be rigorously The labor covenant.

(*n*) Act No. 1120, sec. 3.

(*o*) Act No. 1120, sec. 77, authorising regulations to be made.

(*p*) *City of Melbourne G.M. Co. v. The Queen*, 4 W.W. & A'B. (E.) 148 (1867); *Perkins v. Hercules G.M. Co.*, 5 W.W. & A'B. (M.) 48

(1868).

(*q*) Under 47 Vic. No. 10 (Tas.).

(*r*) *Mount Reid S.M. Co. v. Johnson, Hore Dig.* (Tas.), 77 (1893); but see now 57 Vic. No. 24 (Tas.), sec. 136.

(*s*) Act No. 1514, sec. 28 (*i*).

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Sec. I.*

enforced" (*t*). And a lease is not rendered irrevocable by the fact that the lessee has done work or expended money in exercise of his rights, nor would such a fact form an equitable plea (*u*).

No rights before
lease granted.

An applicant for a gold-mining lease acquires no title to the land until his lease is granted; he is not entitled to mine on the land before the granting of the lease, though he has power to prevent other people mining on it; if he does mine he is regarded as an unauthorised trespasser on public property (*v*).

Under the Tasmanian law, though a lessee took no interest at law or in equity as against the Crown (*w*) until he had obtained his lease, yet until then he could bring no action of trespass (*x*). And the *Gazette* notice of forfeiture under the Act No. 1514, secs. 35, 36, and of an intention to grant a lease to the applicant for such forfeiture, will not entitle such applicant to mine on the land in expectation of his lease being obtained, as against another person who has marked out the land and applied for a lease of it (*y*); and a person who obtains a Crown grant of land of which a mining lease has been previously granted cannot mine on it, or authorise others to mine on it, during the currency of the lease (*z*): and *à fortiori*, such land cannot be applied for or taken up under Part II of the Act No. 1514 (*a*) during the term of the existing lease.

Exclusive
privilege of
lessee.

No person other than the leaseholder has any right to mine on land held under a gold-mining lease from the Crown, as the lease passes all mining privileges exclusively to the lessee. The holder of a miner's right has no authority to

(*t*) *Per Higinbotham, J.*, in *Barwick v. Duchess of Edinburgh Co.*, 8 V.L.R. (E.) 70; 3 A.L.T. 68, 121 (1882); see Act No. 1514, Part I, sub. 4, as to breach of labor covenant.

(*u*) *Hetherington v. Samson*, 4 N.Z.J.R. (N.S.) S.C. 84 (1878).

(*v*) *Att-Gen. v. Sanderson*, 1 V.R. (M.) 18; 1 A.J.R. 21 (1870).

(*w*) Under Act 46 Vic. No. 20

(Tas.).

(*x*) *Omant v. Stephen*, Hore Dig. (Tas.) 78 (1891); see present Act 57 Vic. No. 24 (Tas.), sec. 34.

(*y*) *Robertson v. Morris*, 7 V.L.R. (M.) 1; 2 A.L.T. 109 (1881).

(*z*) *Alma Consols G.M. Co. v. Alma Extended Co.*, 4 A.J.R. 144, 190 (1873).

(*a*) Relating to mining on private land.

mark out a claim (b), or to search for auriferous quartz or to prospect on the leased land (c), for a mining lease having been granted gives to the lessee the exclusive right to mine on the leased land, and any entry by other miners is a trespass so long as the lease remains valid (d).

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Sec. I.*

And so, where a creek with full and free access thereto was reserved in a gold-mining lease of land which included part of the creek, and the holder of a miner's right took up a portion of the creek as a claim, it was held that the occupation under miner's right was illegal, and that, as between the parties, the creek was protected from occupation, such occupation not being based on any legal proceeding; and *quære*, whether the holder of a miner's right could obtain possession by legal proceedings (e).

Trespass by holder of miner's right.

But a gold-mining lease, even if granted, will not be effectual as against the holder of a miner's right in lawful possession of the leased land, though a residence area may be included in an application for a lease upon payment of compensation (f), and a certificate of title under the *Transfer of Land Act* of the leased land in the name of the lessee, purporting only to grant the land, does not include a mine or a claim held under miner's right at the date of the lease, but only the surface above such mine or claim (g). The claimholder is not bound to resist the granting of a lease of his claim applied for by another person, but he is entitled to do so, and he may protect himself against the lease when granted by showing his lawful title; and his not objecting will not invalidate his title previously acquired (h).

Prior occupation under miner's right.

(b) Act No. 1120, sec. 65.

(c) *Harwood v. Coster*, 2 W. & W. (L.) 163 (1865), decided under *The Leases of Auriferous Lands Act* (25 Vic. No. 148); compare Act No. 1120, sec. 65.

(d) Compare 56 & 57 Vic. No. 587 (S.A.), sec. 117; 62 Vic. No. 24 (Q.), sec. 38; 37 Vic. No. 13 (N.S.W.), sec. 50.

(e) *Walhalla G.M. Co. v. Jennings*, 1 V.L.R. (M.) 12 (1875).

(f) Act No. 1120, sec. 52; and compare 57 Vic. No. 24 (Tas.), secs.

29, 36. The Court will not set aside a lease of land held under miner's right, as it is a nullity and there is nothing to set aside; a lease, though including the same area, does not apply to land held under miner's right; *Aladdin G.M. Co. v. Aladdin and Try Again G.M. Co.*, 6 W.W. & A'B. (E.) 266 (1869).

(g) *Munro v. Sutherland*, 5 A.J.R. (2) 75, 139 (1874).

(h) *Stephens v. Jolly*, 5 A.J.R. 162 (1874).

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Sec. I.*

If a gold-mining lease be granted by the Crown comprising land at the time of the demise lawfully occupied by the holder of a miner's right, who has not assented to the lease, such lease is void *quoad* the land so occupied, and no proceedings to set it aside are necessary (*i*).

Claimholder
may apply for
lease.

The holder of a claim may if he choose apply for a lease of the land held by him under miner's right, or any part of it, or may include it in an application for a lease of other adjoining ground (*j*). In South Australia, if payable gold is found in a claim the Warden is empowered to order the claimholder to apply for a lease of the land, with the alternative of forfeiture of all right to his claim on his refusing to make such application (*k*). But when the holder of a claim applies for and obtains a lease of part only of the ground comprised in his claim, it will be presumed that he has abandoned any portion of the original claim which is not included in the parcels of the lease (*l*). "If the holder of a claim under miner's right consider it advisable to abandon that title and obtain a lease, he may do so; and any lease granted to any other person is subject to his right, so that he, although the holder of a mere licence, and of no estate at all, is put in a higher position than the holder of a lease" (*m*).

Consent by
persons
interested.

An applicant for a gold-mining lease must, if able to do so, obtain the consent in writing of all persons having to the knowledge of the applicant any interest in the land applied for (*n*), and though a claim legally acquired and occupied is paramount to a subsequent application for lease so as to make the consent of the claimholder necessary, yet the consent of persons only equitably interested in a claim is not necessary, though the consent of a trustee to the grant-

(*i*) *Aladdin G.M. Co. v. Aladdin and Try Again United G.M. Co.*, 6 W.W. & A.B. (E.) 266 (1869); *Coates v. South Loch Fyne G.M. Co.* (2), 25 V.L.R. 543; 6 A.L.R. 62; 21 A.L.T. 223 (1900).

(*j*) Act No. 1120, sec. 68.

(*k*) 56 & 57 Vic. No. 537 (S.A.), sec. 39.

(*l*) *Mulcahy v. Walhalla Co.*, 5 W.W. & A.B. (E.) 103 (1868); see judgment on appeal to Privy Council, 40 L.J.P.C. 41; 2 A.J.R. 93 (1871).

(*m*) *Per Stawell, C.J.*, in *Aladdin G.M. Co. v. Aladdin and Try Again United G.M. Co.*, *supra*.

(*n*) Leasing Regulations, cl. 5.

ing of a lease in fraud of those interested might form a ground of equitable interference (o). *Bk. II. Ch. I. Sec. I.*

A lessee in possession under a gold-mining lease may maintain trespass against all persons interfering with his lease. He is entitled to restrain any tortious mining on, or removal of gold from, the leased land (p), or he may bring a complaint against any person trespassing on such land, whether the trespass be on the surface or otherwise, and the Warden has jurisdiction to hear and determine the complaint under the Act No. 1120, secs. 135, 216 (q). Possession of the site comprised in a lease from which earth has slipped is *prima facie* evidence of property in the earth to enable the lessee to sue for trespass (r); and in a gold-mining lease under the Mining Act of Western Australia, reserving to the Crown "stone, gravel, earth, or other material for any lawful public purpose," the words do not include gold, and the Government are not entitled under the reservation to remove from leased land gold-bearing material for the construction of a railway (s). Lessee may maintain trespass.

Marking out as a claim land the subject of an application for lease pending the application is a trespass (t); so, pending application for renewal of a lease (u). And marking out land held under lease prior to the expiry of the term of the lease will not confer any title upon the person marking out such land as a claim, even though he is and remains in possession; and in a suit for trespass on the leased land the lease itself may be put in evidence to show that at the time of the marking out the term of the lease had not expired (v). Marking out as a claim pending application for lease.

But lessees who have let their mine on tribute, and of which the tributers are in possession, have no possessory title, and therefore cannot sue third parties for trespass Tributers.

(o) *Australasia Co. v. Wilson*, 4 A.J.R. 18, 63 (1873).

(p) *Aladdin G.M. Co. v. Aladdin and Try Again United G.M. Co.*, *supra*.

(q) *Extended Cross Reef Co. v. Creaver*, 4 A.J.R. 10 (1873).

(r) *Clayton v. Morrison*, 2 N.Z.

C.A. 263 (1873).

(s) *Monte Christo G.M. Co. v. Commissioner of Railways*, 1 W.A. L.R. 161 (1899).

(t) Act No. 1120, secs. 70, 71.

(u) Act No. 1514, sec. 49.

(v) *Cooper v. White*, 4 V.L.R. (M.) 10 (1878).

Bk. II. Ch. I.
Sec. I.

upon it, though they may sue for damage to their reversionary interest (*w*).

Act No. 291 sec.
37.

Before the date of the coming into operation of the Act No. 446 (*x*) trespass could be maintained under section 37 of the Act No. 291 (No. 1120, sec. 65) by an applicant for a gold-mining lease against a person who was not previously in lawful occupation of the land applied for, and who after the application for such lease obtained as against the applicant an adjudication of forfeiture by the Warden as a claim of the land subject matter of the application for lease, and purporting to enter upon the land in pursuance of such adjudication, and remaining on and actually working it (*y*). "This clause (Act No. 1120, sec. 65) restricts the right which persons would otherwise have to take up after an application for a lease, and makes them provisional trespassers subject to the fate of the application, and I think by necessary implication subjects them to have their titles, whatever they may be, defeated by the lease" (*z*). This section was enlarged by section 3 of the Act No. 446 (section 70 of the Act No. 1120), which makes marking out for a claim pending an application for lease a trespass, and invalid for all purposes.

Leases of
reserved lands.

Land granted or reserved for railways, waterworks, public parks, places of recreation, or other public purposes and vested in the Board of Land and Works or the railway commissioner may be included in a gold-mining lease (*a*), and public roads, being vested in the Crown (*b*), may be applied for as ordinary Crown land (*c*); and though it was formerly held that a mining lease as of Crown land could not give the right to mine under the half of a road which had previously become private property by virtue of a Crown

(*w*) *Penistan v. Great Britain Co.*, 5 A.J.R. 18 (1874). See *post*, Sec. III, "TRIBUTE AGREEMENTS."

(*x*) Dec. 17, 1872.

(*y*) *Hutcheson v. Erk*, 3 V.L.R. (M.) 1 (1877); *Constable v. Pigtail Q.M. Co.*, 3 V.L.R. (M.) 7 (1877).

(*z*) *Per* Molesworth, Ch. Judge,

in *Rendall v. Hadley*, 2 V.R. (M.) 21; 2 A.J.R. 105 (1871).^o

(*a*) Act No. 1120, sec. 53; No. 1514, sec. 27.

(*b*) *Local Government Act 1890* (54 Vic. No. 1112), sec. 395.

(*c*) *Shamrock Co. v. Farnsworth*, 2 V.L.R. (E.) 165 (1876).

grant conveying the land abutting on it (*d*), yet it was subsequently held by the Full Court that property in the soil *ad medium filum viæ* in a public street, road, or highway in Victoria cannot be, and never has been, created merely by a grant from the Crown of the land adjoining such street, road, or highway, the property of which remains in the Crown (*e*). Crown land within a proclaimed gold-field in New South Wales (*f*) was similar to reserved land, and could not be taken up as a conditional mineral purchase (*g*).

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Sec. I.*

Nevertheless the local municipality, being the body having the control of a street or road, is entitled to receive notice of an application for a gold-mining lease of such road (*h*), and the permission of such municipality must be obtained by the applicant for the lease if he desires to break the surface of the road or street.

Breaking surface of roads.

In a proceeding before justices for disturbing the soil of a street the defendant claimed the soil of the street under a mining lease and contended that the jurisdiction of the justices was ousted, a claim of title being involved; it was held that the objection was not tenable, for if the land was a street the defendant had no power to disturb it, and the only question for the justices to decide was whether the place was a street or not (*i*).

Jurisdiction of justices.

In Victoria, Western Australia, Tasmania and Queensland the applicant for a lease need not be the holder of a miner's right, though the possession of a miner's right or mineral licence by the applicant is necessary in New South Wales and New Zealand.

Miner's right held by applicant.

The determination of a lease is a termination of the title held under it, and after the expiration of a lease by effluxion

Acceptance of rent after expiration of term.

(*d*) *Davis v. The Queen*, 6 W. W. & A. B. (E.) 106 (1869).

(*e*) *Garibaldi Co. v. Craven's New Chum Co.*, 10 V. L. R. (L.) 233; 6 A. L. T. 93 (1884).

(*f*) Under Act 25 Vic. No. 1 (N. S. W.).

(*g*) *Wood v. Scott*, 6 N. S. W. L. R. (L.) 83 (1885).

(*h*) Leasing Regulations, cl. 5.

(*i*) *Koh-i-noor Mining Co. v. Drought*, 3 V. R. (L.) 75; 3 A. J. R. 48 (1872).

*Bk. II. Ch. I.
Sec. I.*

of time, acceptance of rent by the Crown does not confer any new title on the lessee (*j*); but *quere* whether such acceptance of rent during the currency of a lease would not avoid a forfeiture for breach of the labour covenants incurred previous to such acceptance (*k*).

How lease determined.

In order to determine a gold mining lease before the expiration of the term the Crown must take some step beyond simply declaring it void. Until such a step is taken the lessee remains entitled, as between it and individuals, to keep possession, and to mine and retain the proceeds of mining, and to maintain a suit for trespass against persons trespassing. Land liable to be forfeited, and declared to be forfeited, but still in the possession of a tenant, cannot be forcibly taken from him by a stranger. Thus, Barwick and party were the lessees from the Crown of a gold-mining lease which contained a proviso for forfeiture in case of breach of covenants, and the lease was by *Gazette* notice declared to be forfeited, but the Crown did not re-enter or take possession. The defendant company was mining on the land under colour of its having taken possession of it under miner's right subsequent to the declaration of forfeiture. Barwick and party filed a bill against the company to restrain it from trespassing, and for an account of the gold raised. It was held by the Full Court (Williams, J., *dissentiente*), affirming Higinbotham, J., that as the lease was not forfeited merely by the declaration in the *Gazette*, Barwick and party were entitled to maintain the suit, and an injunction was granted, and an account directed (*l*).

*Barwick v.
Duchess of
Edinburgh Co.*

Where covenant *ultra vires*.

The Crown cannot lawfully grant a lease which contains a covenant inconsistent with the policy of the Act, so as to reduce mining leases to tenancies at will, or to invest a body

(*j*) *Durant v. Jackson*, 1 V.L.R. (M.) 6 (1875).

(*k*) *Barwick v. Duchess of Edinburgh Co.*, 8 V.L.R. (E.) 70; 3 A.L.T. 68, 121 (1882); *Ives v. Lator*, 13 V.L.R. 941; 9 A.L.T. 98 (1887).

(*l*) *Barwick v. Duchess of Edin-*

burgh Co., 8 V.L.R. (E.) 70; 3 A.L.T. 121 (1882). As to leases which have been declared void where other persons have been put in possession, or have obtained possession under colour of title from the Crown, see Act No. 1120, sec. 76.

not possessed of powers for judicial investigation of facts (e.g. the Governor-in-Council) with the conclusive determination of facts which should constitute a forfeiture; nevertheless, if a lessee accepts and executes a lease, a covenant of which is *ultra vires* the *Mines Act* 1890, Part I, he is nevertheless bound by such execution from objecting to it, and cannot at the same time insist that the lease is effectual to pass the estate to him, and ineffective as providing for its termination, on the ground that he took the lease which the Governor might grant or withhold, and which he had no right to insist upon, and then reject the terms it imposed; and a certificate of title under the *Transfer of Land Act* 1890 (*m*) of leasehold land obtained on transfer of a mining lease, although made paramount by section 74 of that Act, does not defeat the right of the Crown to determine the estate (*n*).

Bk. II. Ch. I.
Sec. I.

The Crown cannot grant a reversionary lease to a person applying for a new lease during the currency of a former one under section 49 of the Act No. 1120, and section 70 does not apply to such an application; if the lessee desires to obtain a renewal of his lease he must apply for it in the ordinary way after the expiration of his current lease (*o*).

Reversionary
lease cannot be
granted.

A person holding a lease for which he is virtually a trustee for a company, though he may not have transferred the lease to the company, will be declared to be a trustee only; and this will apply to assignees of the company, or to purchasers of the company's effects from the sheriff under execution. Thus, where three persons, holding a gold-mining lease in their own names, formed a company which worked the ground, but the lease was never transferred to the company, and plaintiff obtained a judgment against the company, and at the sheriff's sale under the execution bought the interest of the company in the lease, it was held that the lessees were trustees for the plaintiff, and should

Lease held by
trustee.

(*m*) 54 Vic. No. 1149.

(*n*) *Matt v. Peel*, 2 V.R. (M.) 27;
2 A.J.R. 133 (1871).

(*o*) *Durant v. Jackson*, 1 V.L.R.
(M.) 6 (1875).

*Bk. II. Ch. I.
Sec. I.*

transfer the lease to him (*p*). A purchaser also at a sheriff's sale of all the property of a company would be entitled to a lease granted subsequently to the purchase to a person who applied for it as trustee for the company before the purchase (*q*).

Sale by sheriff.

In Western Australia the sheriff is entitled to seize under an execution a share or interest in a gold-mining lease in the name of the execution debtor (*r*).

Execution with-
in prescribed
time.

Under the leasing regulations of 1871, cl. 28 (*s*), if the applicant failed to execute the lease within sixty days after the day of the date of the *Gazette* in which a notice that the lease was ready for execution by the lessee had been published, the lease was deemed void; and this from whatever cause the default arose. Thus, after the granting of a gold-mining lease to the manager of a company, who died before executing it, application was made by his successor to the Minister of Mines for permission to execute the lease in his stead; such permission was not granted within sixty days after the *Gazette* notice that the lease was ready for execution, and proceedings were taken by the holder of a miner's right before the Warden to be put in possession of the land as being in illegal occupation of the company; it was held that the lease was deemed void under the then existing regulations (*t*), and that the Warden might so regard it, and that there was no legal or equitable interest in the representatives of the deceased lessee to make them necessary parties (*u*).

Death of
applicant.

Under the Tasmanian Act 57 Vic. No. 24, sec. 43, where an applicant for a lease died before the lease was executed, it was held that his partner was entitled to preference on an

(*p*) *Randall v. Mau*, 2 V.R. (E.) 158; 2 A.J.R. 103 (1871).

(*q*) *Australasia Co. v. Wilson*, 4 A.J.R. 18, 63 (1873).

(*r*) *Great Hannan's Aurora G.M. Co. v. Barnes*, 1 W.A.L.R. 1 (1898).

(*s*) Compare Leasing Regulations of 1897, cl. 32.

(*t*) Leasing Regulations of 1871, cl. 28.

(*u*) *Forrester v. Great Western Long Tunnel G.M. Co.*, 13 V.L.R. 381; 8 A.L.T. 177 (1887); *Wissing v. Finnegan*, 3 V.R. (M.) 16; 3 A.J.R. 126 (1872). Under the Act No. 1514, sec. 48, in case of the death of the applicant before issue of the lease, such lease may be issued in his name, and be executed by his representatives.

application by him to have the lease cancelled and re-issued to himself (*v*). *Bk. II. Ch. I. Sec. 1.*

However, by the existing leasing regulations (*w*), unless the applicant execute the lease within twenty-one days from the date of the publication in the *Gazette* of a notification that the lease is awaiting execution, the Governor-in-Council has a discretionary power immediately after the expiration of the period to declare the lease void. Thus, the lease is not void, but merely voidable at the discretion of the Governor-in-Council. Regulations of 1897.

The yearly rent payable in respect of a gold-mining lease of Crown land is two shillings and sixpence for every acre demised (*x*). Rent.

SECTION II.—TAILINGS.

The ownership of tailings left by a lessee on Crown land formerly held by him under a gold-mining lease which has expired by effluxion of time, or has been surrendered or declared void, and which he has neglected to remove, or to *bond fide* treat, within twelve months after the avoidance of the lease, is dealt with by section 53 of the Act No. 1514, by which section licences are authorised to be issued to persons desirous of treating the tailings. Ownership of tailings.

Most of the by-laws provide for registration of sites for tailings for the purpose of stacking or treating, or for the purpose of protecting them on abandoned claims, in a form and in manner similar to that prescribed for the registration of ordinary claims; and a like provision obtains in the other States. By-laws.

The former Mining Act of New Zealand (*a*) gave the holder of a claim the exclusive right to tailings stacked upon New Zealand.

(*v*) *In re White, Thomas v. Commissioner of Lands*, Hore Dig. (Tas.) 80 (1896).

(*w*) Leasing Regulations, Oct. 8,

1897, cl. 32.

(*x*) Act No. 1514, sec. 28 (i).

(*a*) 50 Vic. No. 51 (N.Z.), secs. 96, 97.

*Bk. II. Ch. I.
Sec. II.*

Queensland.

the ground by a former owner, where such tailings were not protected as provided by the regulations (*b*). Under the Queensland regulations a tailings area could be taken up (*c*), as also an auriferous sands claim (*d*), and both might be taken by the same person under the combined provisions of the Acts (*e*), though an auriferous sands claim could not be taken up on a tailings area in the occupation of another person (*f*). The Warden had no jurisdiction in his judicial capacity to cancel a tailings area for non-user; that could only be done by the Crown, or by the Warden acting as a ministerial officer (*g*).

Title to tailings.

Tailings do not become part and parcel of the land on which they are deposited (*h*): and the holder of a mining licence in New Zealand cannot enter upon the ground and remove tailings or soil or washdirt after the term of his licence has expired (*i*).

Licence to treat.

A licence to treat tailings granted under section 53 of the Act No. 1514 gives a right to the licensee to remove the tailings for treatment, or to treat them on the ground; a gold-mining lease of the land may, however, be granted to another person, subject to the rights of the licensee (*j*).

Abandoned
quartz tailings.

Quartz tailings which have been abandoned (*k*) may be the subject matter of an action of trover by the party who separated them from the land for the purpose of extracting gold therefrom: when abandoned they remain the chattels of the party who severed them from the land, who has a right to them against everyone (*l*). This decision was

(*b*) *Grayson v. Delaney*, 10 N.Z. L.R. 134 (1891); see now 62 Vic. No. 38 (N.Z.), secs. 105, 108; and 63 Vic. No. 29 (N.Z.), sec. 22; see also 56 & 57 Vic. No. 587 (S.A.), Reg. 53; 57 Vic. No. 24 (Tas.), secs. 60, 67, Part VIII, sec. 125.

(*c*) 38 Vic. No. 11 (Q.).

(*d*) 50 Vic. No. 32 (Q.).

(*e*) *Crisp v. Kent*, 7 Q.L.J. 96 (1896).

(*f*) *Johns v. Fowler*, 8 Q.L.J. (N.C.) 40 (1897); see now Act 62 Vic. No. 24 (Q.).

(*g*) *Dodds v. Parsons*, 8 Q.L.J.

(N.C.) 39 (1897), following *Smyth v. Missingham*, 8 Q.L.J. (N.C.) 26.

(*h*) *Wallace Bethanga M. & S. Co. v. Robinson, Argus*, June 4, July 29, 1892. Tailings are a chattel property; *Rees v. Duncan*, 6 A.L.R. 44 (1900).

(*i*) *Grayson v. Delaney*, 10 N.Z. L.R. 134 (1891).

(*j*) Act No. 1514, sec. 53.

(*k*) Maryborough By-laws, No. 4.

(*l*) *Sydenham Q.M. Co. v. Ah Chong*, 23 V.L.R. 441; 19 A.L.T. 138; 3 A.L.R. 270 (1897).

given before the coming into operation of the *Mines Act* 1897, which enacts with regard to tailings on land comprised in a lease which has become void, that if the lessee does not remove or *bonâ fide* begin to treat the tailings within twelve months of the surrender or avoidance of the lease, or take out a licence to treat the tailings, he will lose all right to such tailings, as on any such abandonment they become the absolute property of the Crown (m). The Act, however, refers only to tailings on land formerly held under lease, and does not apply to tailings on abandoned claims.

*Bk. II. Ch. I.
Sec. II.*

The mining boards are empowered to make by-laws for preventing the accumulation, and for effecting the taking away and depositing, of sludge, tailings, or other waste or refuse matter flowing from any land worked by means of puddling, quartz crushing or other machines, and of the water used and suffered to run to waste (n).

Prevention of
nuisance.

Quartz tailings deposited on Crown land are not within the substances the removal of which from Crown land is prohibited by the *Land Act* 1890 (o), the intention of which is to prevent the searching for and removing from Crown land that which has always been there *in situ*, and not that which by human means may have been deposited (p).

Removal from
Crown land.

SECTION III.—TRIBUTE AGREEMENTS.

What is commonly known as a gold-mining tribute is an agreement in the nature of a sub-lease or sub-licence whereby certain parties agree to work a mine or a portion of it in consideration of receiving as and by way of wages a tribute, or percentage of the gold obtained; it is not a partnership, the relation between the parties being rather that of master and servant. An agreement for tribute,

Agreement to
let on tribute.

(m) Act No. 1514, sec. 53 (i).
(n) Act No. 1120, sec. 106 (xv).
(o) 54 Vic. No. 1106, sec. 114.

(p) *Potter v. Wilkins*, 2 V.L.R. (L.) 47 (1876).

*Bk. II. Ch. I.
Sec. III.*

whether on Crown land or private land, may be drawn up in the form given in Schedule IV to the Act No. 1514 (sec. 158), and it must be in writing and signed in triplicate, one copy being retained by each of the parties, and the other copy filed with the Warden; and it must describe by metes and bounds the land agreed to be let on tribute, and must specify the number of men to be employed by the tributers (*a*). The terms and conditions of the agreement are arranged by the parties between themselves, subject to the requirements of the Act being complied with (*b*), and so, where tributers had agreed to allow the mine-owner to retain certain money as security against breakage or injury to the property of the mine-owner, and also agreed to repair damage that might occur to the mine or machinery, and to hand them over to the mine-owner in good order and condition at the end of their agreement, it was held that the making of necessary repairs was a condition precedent to the re-payment to them of the money held as security (*c*).

Sustenance
money.

By virtue of section 162 of the Act No. 1514 every tribute agreement must contain a provision for payment of sustenance money out of the proceeds of the gold obtained under the agreement, upon a scale to be agreed on by the parties, but it must be not less than half the usual wages paid to miners in the district within which the ground held under tribute is situated. Sustenance money is payable to each individual tributer, but the section does not apply to registered companies.

Settlement of
disputes.

All disputes in respect of the ground, or the gold, or payment of sustenance money, are to be decided by complaint before the Warden, and all disagreements as to working are to be referred to the Inspector of Mines, and in case either

(*a*) Act No. 1514, sec. 159. An information for a penalty for non-compliance with the requirements of this section by a tributer, who had agreed to contract himself out of the Act, against his mine-owner was properly dismissed, as the section is for the benefit of the tribu-

ter; *Tie v. Lansell*, 6 A.L.R. 38 (1900).

(*b*) As to tribute agreements in New Zealand, see Act 63 Vic. No. 29 (N.Z.), sec. 15.

(*c*) *Great Gulf Co. v. Sutherland*, 4 A.J.R. 158 (1873).

party is dissatisfied with his decision the matter may be settled by the Warden, whose decision is final (*d*). All disputes as to title are to be settled by the Warden without assessors (*e*).

*Bk. II. Ch. I.
Sec. III.*

An agreement between a mine-owner and tributers enabling them to mine on his land, and providing that all gold obtained by the tributers from land subject to the agreement should for all purposes be deemed to be the property of the mine-owner, and that the ground to be worked should be such portions of the mine-owner's claim as his mining manager should from time to time determine, was held to give the tributers an exclusive right to mine on all the land, and a licence could not be granted to others to mine on portions of the same ground (*f*).

Exclusive right to mine.

The percentage of gold to which each of the parties is entitled is to be calculated on the nett value of the gold obtained (*g*), and sustenance money is made a first charge on the gold (*h*). The gold itself remains the property of the mine-owner, and where a mine-owner agrees to reserve a percentage out of the gold, and to pay the remainder to the tributers, the property in the gold does not pass to the tributers; any one of them fraudulently taking away portions of the gold may be convicted of larceny (*i*); and a tribute agreement does not confer on the tributers an interest in land within the meaning of reg. 1 of the general rules for proceedings before Wardens (*j*); but the holder of a mining lease, who has let his mine on tribute, and of which the tributers are in possession, cannot sue a third party for trespass upon it; he can only claim for damages to his reversionary interest (*k*).

Percentage.

Property in gold obtained.

If tributers fail to work the mine continuously the mine-owner may cancel the tribute agreement, and the tributers,

Cancellation for non-working.

(*d*) Act No. 1514, secs. 160, 161.

(*e*) *Ibid*, sec. 160.

(*f*) *Chun Goon v. Reform G.M. Co.*, 8 V.L.R. (E.) 128; 3 A.L.T. 81, 137 (1881).

(*g*) Act No. 1514, sec. 163.

(*h*) *Ibid*, sec. 162.

(*i*) *Reg v. Hawkins*, 2 N.Z.C.A. 367 (1874); see *Reg. v. Davies*, 6 W.W. & A'B. (L.) 246 (1869).

(*j*) *Morrison v. Teague*, 17 A.L.T. 87; 1 A.L.R. 74 (1895).

(*k*) *Penistan v. Great Britain Co.*, 5 A.J.R. 18 (1874).

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Sec. III.

if dissatisfied, may make complaint to the Warden, and the complaint is deemed a proceeding within section 219 of the Act No. 1120 (*l*).

Existing rights
saved.

No mine or portion of a mine may be let on tribute without the sanction in writing of the Minister except in cases of *bonâ fide* mortgage charge or encumbrance, and one general permission to let a tribute is sufficient for a term of twelve months (*m*); and when a gold-mining lease of Crown land, which is let on tribute, is declared void for breach of the labour covenant under Part I, sub. 4, of the Act No. 1514, any lease of the land granted to the applicant for forfeiture will only be issued to him subject to the existing rights of the tributer or sub-tributer, whose agreement will continue in force as between him and the new lessee (*n*). And the same law is applied to tributers under leases of private land (*o*). A tribute agreement, whether relating to Crown land or private land, will not run during the period the tributer is by reason of the forfeiture prevented from working his tribute, and any time lost through this cause will be added to the original term of the tribute agreement (*p*).

The provisions of section 159 of the Act No. 1514 are for the benefit of the tributer, who may therefore contract himself out of them, so that they will not be binding on the mine-owner (*q*).

(*l*) Act No. 1514, sec. 165.

(*m*) *Ibid*, secs. 51, 121.

(*n*) *Ibid*, sec. 52.

(*o*) *Ibid*, sec. 120.

(*p*) *Ibid*, secs. 52, 120.

(*q*) *Tie v. Lansell*, 6 A.L.R. 38 (1900).

CHAPTER II.

APPLICATION FOR GOLD MINING LEASES.

SEC. I.—REQUIREMENTS PRELIMINARY TO GRANTING OF LEASES.

SEC. II.—GRANTING OR REFUSAL OF LEASES.

SEC. III.—MARKING FOR A CLAIM PENDING APPLICATION FOR LEASE.

SEC. IV.—PRIORITY OF LEASES.

SEC. V.—APPLICATION BY HOLDERS OF MINERS' RIGHTS TO AVOID LEASES.

SEC. VI.—LEASES OF RESERVED LANDS.

SECTION I.—REQUIREMENTS PRELIMINARY TO GRANTING OF LEASES.

HAVING considered the subject of gold-mining leases generally, we may now proceed to discuss the means of applying for a lease of Crown land not already demised, and not occupied by the holder of a miner's right or business licence, except with the consent of such holder. The regulations made by the Governor-in-Council in pursuance of the *Mines Acts* prescribe the procedure (a), and these regulations are to be strictly complied with in every particular, for any default in the application may determine the rights of the applicant for lease. The leasing regulations now apply to all classes of land, whether Crown land, reserved land, or

*Bk. II, Ch. II.
Sec. I.*

Mode of
application for
lease.

(a) Leasing Regulations, Oct. 8, 1897.

Bk. II. Ch. II. Sec. 1. private land, all or any of which may be included in one application and in one lease (b).

Preliminary requirements.

The requirements of the leasing regulations preliminary to the application for lease are contained in reg. 4, and these requirements must be complied with within seven days previous to lodging the application with the Warden; the calculation of days is exclusive of Sundays, Good Friday, and Christmas Day (reg. 1).

I. MARKING OUT.

1. The first preliminary requirement (reg. 4 (A)) is marking out the land by erecting posts, at least three inches square, not less than three feet above the ground, as far as circumstances and occupiers will permit, to define accurately the boundaries and angles of the land applied for, with a metal plate thereon having painted the words "applied for lease," with the date of marking out and the name of the applicant, or (if more than two) of the two first applicants, legibly painted thereon; and in case only a portion of the surface is required it must be marked out by posts painted red, and at least two feet out of the ground. These posts are to be kept so erected and painted, or replaced if removed or torn down, until the termination of the proceedings under the regulations.

Insufficient marking.

Marking out by painting on the metal plate the name of one only of three applicants, the posts being saplings and not painted white, is not sufficient compliance with the regulations (c); and where the regulations permitted marking by a tree, scraping the bark off it and affixing the notice without cutting into the tree was held insufficient marking (d).

Time from which marking out dates.

The time of marking out will date from the time when the requirements of the regulations have been fully complied with and completed. Thus, where an applicant put in posts on February 18, but did not paint them white or put on

(b) Act No. 1514, sec. 29.

(c) *Allison v. Sharp*, 17 A.L.T. 240; 2 A.L.R. 50 (1896). Painting

white is not required by reg. 4 (A).

(d) *Harvey v. Taylor*, Hore Dig. (Tas.) 79 (1889).

metal plates as required until the 21st, the marking out was held to date from the 21st (*e*). The marking out is directed by section 65 of the Act No. 1120 as the first proceeding of the applicant for a lease, and reg. 4 (A) must be complied with in every respect before the land is legally marked out (*f*).

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Sec. I.*

An applicant may not include in his application land that he has not marked out (*g*); and should there be any discrepancy between the description of the land in the application and the surface area marked by the posts, only the land marked out by the applicant is protected by an application for lease, not the land described in the application by means of boundaries, &c. (*h*).

Area marked out.

A defendant who has applied for and obtained a gold-mining lease of Crown land without entering on or marking out such land (*i*) has no title against a plaintiff who had entered under a mineral lease properly obtained (*j*).

Application without marking.

The penalty for unlawfully removing or displacing any post erected to define boundaries and angles of any land applied for or held under a mining lease is any sum not exceeding Ten pounds, and the applicant or any person authorised by the Minister may prosecute for the offence (*k*).

Penalty for removing posts.

2. The second preliminary requirement (reg. 4 (B)) is the insertion in a newspaper published in the district in which the land is situated, or if no such newspaper, then in the one published nearest to the land, of an advertisement or notice in the form prescribed by the regulations (*l*). The forms of this notice can be obtained from every office of the Warden, and the information required must be filled in

II. ADVERTISING NOTICE OF APPLICATION.

(*e*) *Clarence United Co. v. Goldsmith*, 8 V.L.R. (M.) 14; 3 A.L.T. 147 (1882).

(*f*) *Hutcheson v. Erk*, 3 V.L.R. (M.) 1 (1877).

(*g*) *Plant v. Harris*, Hore Dig. (Tas.) 80 (1896).

(*h*) *Brereton v. Wade*, 5 W.N. (N.S.W.) 78 (1889).

(*i*) Under the Mining Act of New South Wales, 37 Vic. No. 13.

(*j*) *Penglase v. Broken Hill Junction North S.M. Co.*, 5 W.N. (N.S.W.) 85 (1889).

(*k*) Act No. 1514, sec. 56.

(*l*) Sched. A, "Notice of application for a mining lease."

Bk. II. Ch. II. Sec. I. concisely and distinctly before the advertisement is inserted; omission to state in the notice who is in occupation of the land is a default in the application.

III. POSTING
NOTICE OF
APPLICATION.

3. The third requirement (reg. 4 (c)) is to post notices similar to the advertisement at the office of the Warden, and at the post office or police court, whichever shall appear to the applicant to be nearest to the land by the ordinary road.

At office of
Warden.

Not posting the notice at the Warden's office is a default in the application, and the Warden's office referred to in the regulations as the place at which notices are to be posted is not the court or place where he sits as judge, but the principal place from which he issues his summonses and orders (*m*).

At post office or
police court.

Under the former leasing regulations it was prescribed that the post office or police court at which the notice is required to be posted must be that nearest to the land, but by reg. 4 (c) of the regulations of 1897 it is that which shall appear to the applicant to be nearest by the ordinary road, and not necessarily the one most easily accessible (*n*). If there be any doubt as to which of two post offices is nearest to the land, it is a wise precaution to post a copy of the notice at each.

Errors in the
notice.

The regulations under the Mining Act of Tasmania are mandatory and not imperative, and so long as a notice substantially complies with their requirements it may be amended, and will not be invalid by reason of an unintentional and immaterial error (*o*); *e.g.* an immaterial discrepancy between the notice and the application (*p*); or a

(*m*) *Constable v. Pigtail Q.M. Co.*, 3 V.L.R. (M.) 7 (1877).

(*n*) In *Reg. v. McLachlan*, 3 W. W. & A'B. (L.) 120 (1866), "nearest" was held to mean the nearest spot measured as the crow flies; and see

Att-Gen. v. Prince of Wales Co., 5 W. W. & A'B. (E.) 208 (1868).

(*o*) *Maa Mon Chin v. Hortin*, Hore Dig. (Tas.) 78 (1885).

(*p*) *Raynor v. Curtis*, Hore Dig. (Tas.) 78 (1891).

clerical error in the application (*q*); or any slight mis-
description (*r*). *Bk. II. Ch. II.*
Sec. I.

4. The next requirement (reg. 4 (D)) is to give to every
person owning or occupying the land, or having or claiming
to the knowledge of the applicant to have any rights on or
under the land, or any part thereof, a similar notice, the
mode of service of which is prescribed by the regulation.
The words "to the knowledge of the applicant" refer only
to persons claiming rights on or under the land, and not to
persons occupying or having rights thereon (*s*). In includ-
ing a public road in an application for lease a copy of the
notice must be served on the municipality or body having
the care and management of such road, as being a body
having a right or interest in the land applied for. IV. NOTICE TO
OCCUPIERS.

The applicant must state in his notice of application who
is in occupation of the land, otherwise this will be a default
in the application (*t*); and omitting to serve notice of the
application on an occupier of the land, or any part of it, will
also constitute a default. When the occupier is a company
service of the notice on the manager, who takes it and
retains it as served on the company, is sufficient service (*u*). Service of
notice.

But service of notice on an occupier was held insufficient
where effected by thrusting the notice under the door of the
dwelling of such occupier, unless the applicant could show
on the enquiry before the Warden that it reached the person
intended to be served. But see now reg. 4 (D) as to mode
of service. The onus of proof of service of the notice is on
the applicant, and an omission to properly serve notice on
occupiers of the ground applied for is a default within the
meaning of the Act No. 1120, sec. 71 (*v*). Onus of proof of
service.

(*q*) *Carlisle v. Thorne*, Hore Dig.
(Tas.) 78 (1882).

(*r*) *Chapman v. Pratt*, Hore Dig.
(Tas.) 78 (1883).

(*s*) *Basham v. Middlemiss*, Sp. Ct.
Vic. Feb. 2, 1891.

(*t*) *Holmes v. Reynolds*, 11 V.L.R.
711 (1885); Schedule A to Leasing
Regulations.

(*u*) *Constable v. Pigtail Q.M. Co.*,
3 V.L.R. (M.) 7 (1872); as to ser-
vice of process on an incorporated
mining company see the *Companies*
Act 1890 (54 Vic. No. 1074), sec. 201.

(*v*) *Barton v. Band of Hope and*
Albion Consols (2), 5 V.L.R. (M.)
47; 1 A.L.T. 95 (1879).

*Bk. II. Ch. II.
Sec. I.*

Occupier of
road under
permit.

A person who has taken up part of a road under his miner's right in accordance with section 19 of the Act No. 1120, and has applied for a permit to mine under it from the local municipality, is a person in lawful occupation, and is entitled to be served with notice by any person applying for a lease of such road after the permit is applied for and before it is granted, and omission to serve such an occupier is a default in the application (*w*).

All persons
named as
occupiers to be
served.

As it is necessary that the names of all occupiers must be inserted in the notice, an applicant for a lease should take care to ascertain who are the real occupiers before drawing up the notice; for if a person be named as an occupier who is not in fact an occupier, it is assumed he must receive notice, for it has been held that the list of occupiers published by the applicant in his notice of application is evidence against him that the persons named are occupiers (*x*), and by implication that they should all be served.

V. DEPOSIT OF
FEES.

5. The next requirement (reg. 4 (E)) is the deposit with the clerk of the Warden nearest to the land by the ordinary road of the necessary fee of five pounds, and the applicant must in addition to the deposit of five pounds, if required by the Warden, deposit a sufficient fee to cover the cost of survey, in accordance with the scale in schedule C of the regulations (reg. 4 (F)).

Non-payment of
fee for survey.

The fee required for survey is prescribed as such further sum or sums as may be considered necessary in addition to the deposit of five pounds; and non-payment within seven days prior to making the application of a sum of money to cover the cost of surveying interior lines and connecting them with the nearest fixed point, is a default in proceeding with the application within sec. 71 of the Act No. 1120 (*y*).

VI. CONSENT OF
OCCUPIERS.

6. The applicant must also (reg. 5), if able to do so, previous to the application obtain from every person owning

(*w*) *Holmes v. Reynolds*, 11 V. L.R. 711 (1885).

(*x*) *Barton v. Band of Hope and*

Albion Consols, *supra*.

(*y*) *Great Northern Co. v. Brown*, 8 V.L.R. (M.) 1; 3 A.L.T. 89 (1882).

or occupying the land, or having or claiming to the knowledge of the applicant to have any rights therein or any part thereof and willing to give the same, a written consent duly witnessed to the application being granted; and any occupier not willing to give such consent is at liberty to object to the application (reg. 5). These written consents, if obtained, are annexed to the declaration of the applicant or put in evidence at the enquiry before the Warden, and are forwarded by him with his report to the Minister of Mines.

*Blk. II. Ch. II.
Sec. I.*

Though an occupier refusing his consent is at liberty to object to the lease being granted as regards the portion occupied by him, a person in legal occupation of the ground under his miner's right is not bound to do so, and a lease of land occupied by virtue of a miner's right is invalid as to such ground, unless the consent of such occupier to the granting of the lease has been obtained; and the Governor is not warranted in granting a lease to a person or corporation not the applicant, against the protest of the applicant (z). Thus, where a number of persons, holders of miner's rights and equally interested in a claim, appoint one of their number to apply for a lease of the ground on behalf of the whole of them, the written consent of the others to the application should nevertheless be obtained, as they are all occupiers, and something beyond the statement of the applicant will be required to show that he is a trustee for, or that he sufficiently represents, all the owners of the claim.

Person in legal
occupation
need not object.

The registered holder of a claim, though only trustee for others as the manager of a company, can without the authority of his *cestuis que trustent* give a valid consent to a portion of his claim being included in a lease, and the consent of the beneficiaries is not necessary (a).

Consent by
trustee.

(z) *Aladdin G.M. Co. v. Aladdin and Try Again G.M. Co.*, 6 W.W. & A'B. (E.) 266 (1869).

(a) *Band of Hope and Albion Consols v. Young Band Extended*

Co. (3), 9 V.L.R. (E.) 37; 4 A.L.T. 137 (1883); affirmed on appeal, 9 V.L.R. (E.) 71; 5 A.L.T. 12. As to application for licence for mining privileges in New Zealand, compare

*Bk. II. Ch. 11.
Sec. I.*

APPLICATION FOR
LEASE.

Having complied with the preliminary requirements the application itself is then made under reg. 6. This is an echo of the notice of application, and must be lodged with the Warden within seven days after marking out the land under reg. 4 (A), and presumably may be lodged immediately all the preliminaries are complied with (b). To the application must be appended a statutory declaration of the applicant in the form of Schedule E showing how the preliminary requirements have been complied with by him or his agent; and the newspaper advertisement, receipts for deposits and consents of occupiers must be annexed thereto as exhibits (reg. 6). The Warden then, unless otherwise instructed, directs the mining surveyor to survey and make a plan of the land (reg. 9), and should no objection to the application be lodged within three days after the posting of the surveyor's notice under reg. 11 (c), the applicant is not required (unless directed by the Minister) to attend at any further enquiry, and no court of enquiry will be held by the Warden unless required by the Minister, but the whole of the papers and the statutory declaration and exhibits will be forwarded to the Minister by the Warden together with his report and recommendation (reg. 14). The Minister, may, however, require that a court of enquiry be held, notwithstanding that no objection be made to the application (reg. 15).

No court of
enquiry held.

unless directed
by Minister.

Procedure at
court of
enquiry.

Should any person object to the application being granted the Warden will in due course hold a court of enquiry, of which notice is given by him to the applicant and others interested, to consider the application and hear objections thereto (reg. 16 *et seq.*). This court of enquiry is open to the public and the mode of conducting the business of the court is in the discretion of the Warden (reg. 18). As soon as the evidence is taken by the Warden (on the expiration

Act 62 Vic. No. 38 (N.Z.), sec. 136; and for lease in Western Australia, compare Act 59 Vic. No. 40 (W.A.), sec. 37; and in New South Wales, Act 37 Vic. No. 13 (N.S.W.), sec.

39.

(b) Sched. D to Leasing Regulations.

(c) Sched. F to Regulations.

of three days after the adjournment of the court of enquiry) he transmits to the Minister of Mines the application, plan, report of the mining surveyor, consents of occupiers, objections (if any), evidence written and documentary, and all other writings relating to the application, together with his observations and opinion thereon (reg. 19).

*Bk. II. Ch. II.
Sec. I.*

Any person objecting to the application for a lease must within the time prescribed by the regulations lodge with the Warden and serve upon the applicant, or if more than two then upon any two named in the application, at his or their address as stated in the notice, a statement in writing of the grounds of his objection. The service may be personal or by posting the notice of objection to the address stated in the application in a registered letter. No particular form of objection is required, so long as it clearly shows whose application is objected to, the grounds of the objection, and the address of the objector (reg. 12). He must also (reg. 13) deposit with the clerk of the Warden a sum of five pounds, which deposit, as also the deposit of the applicant, is subject to the orders of the Minister of Mines or of the Warden for payment of costs (regs. 43, 44).

OBJECTIONS TO
APPLICATION.

Any person occupying any part of the land applied for under any licence or right derived under the *Mines Act* 1890 is entitled to be compensated for buildings or improvements thereon, whether he has objected to the application or not (*d*).

When compensation payable.

The applicant for a lease must be a person or persons, or a corporation. The Governor has no power to lease to anyone but the applicant; it is his pretensions that the Governor is to weigh, and individuals interested in opposing are to resist. A contemplated company cannot be an applicant, and a lease applied for by a person on behalf of a company which does not then exist will, if granted at all, be granted to the applicant in his own name, and not in that of the company (*e*).

Applicant.

(*d*) Leasing Regulations, cl. 40.

(*e*) *Aladdin G.M. Co. v. Aladdin*

and *Try Again United G.M. Co.*,
6 W.W. & A.B. (E.) 266 (1869).

<i>Bk. II. Ch. II.</i> <i>Sec. I.</i> Withdrawal. Transfer. Attorney. Transfer &c. of lease.	<p>An applicant may withdraw his application at any time, and it is thereupon deemed abandoned (<i>f</i>). He may also transfer his interest in the application; and in case of his death the lease may be issued in his name and be executed by his executor or administrator (<i>g</i>). If the applicant be out of the State he may act by attorney (<i>h</i>), and such attorney is bound to comply with the regulations in the same manner as his principal, if present, would be bound to comply with them (<i>i</i>).</p> <p>A leaseholder may by the licence of the Governor transfer, underlet, mortgage, or otherwise dispose of, or encumber his lease (<i>j</i>); and should he be desirous of working and winning other minerals than those specified in his lease, he may obtain through the Warden a licence to do so (<i>k</i>).</p>
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SECTION II.—GRANTING OR REFUSAL OF LEASES.

Discretion in the Crown. Date when granted. Refusal of lease.	<p>The Crown is not in any way bound to grant a mining lease. Section 67 of the <i>Mines Act</i> 1890 vests an arbitrary discretion in the Governor to grant or refuse an application for a lease, and such discretion cannot be reviewed or controlled by a court of justice. In Western Australia (<i>a</i>) it was held that a lease is granted as of the date of the approval of the application (<i>b</i>).</p> <p>No tribunal is provided by the <i>Mines Acts</i> for entertaining the reasonableness or otherwise of the reasons for refusing a lease. It is merely the duty of the Governor to inform the applicant of the reasons for which a lease is refused, but there does not appear to be any jurisdiction, by <i>mandamus</i> or otherwise, to compel the performance of that</p>
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| <p>(<i>f</i>) Leasing Regulations, cl. 47.
 (<i>g</i>) Act No. 1514, sec. 48.
 (<i>h</i>) Form in Sched. Q to the Regulations.
 (<i>i</i>) Leasing Regulations, cl. 49.
 (<i>j</i>) <i>Ibid.</i>, cl. 50.
 (<i>k</i>) <i>Ibid.</i>, cl. 48.</p> | <p>(<i>a</i>) Under <i>The Goldfields Act</i> of 1895 (W.A.) (59 Vic. No. 40), sec. 36.
 (<i>b</i>) <i>Hannan's Proprietary Development Co. v. Cowley</i>, 1 W.A. L.R. 196 (1899). See Leasing Regulations (Vic.), cl. 27.</p> |
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duty. "It is a class of questions which courts of justice are not properly competent to entertain, involving a variety of points, enquiries in a different department of science, questions of public and private convenience, and individual eligibility and ineligibility, which courts of justice cannot enter into" (c). Neither is there anything in the Act, or the regulations under it, to bind the Governor to follow the opinion of the Warden as to granting or refusing a lease (d); though under the Tasmanian Mining Act (e) the decision of the Commissioner is final and binding on all parties, and on the Minister of Mines, who cannot refuse to grant the lease against the decision of the Commissioner (f). And a petition under the *Crown Remedies and Liability Act* 1890 (g) will not lie against the Crown at the suit of the holder of a mining claim to restrain the issue to other parties of a lease of the land comprised in such claim (h); nor is there any necessity for such proceeding, as the lease, if granted, is invalid as to the claim (i). Land for which an application for a lease had been made but not granted was held (j) not to be land under lease for mining purposes within the Act (k).

Bk. II. Ch. II.
Sec. II.

The Governor has no power to grant a lease to anyone but the applicant. Thus, he is not warranted in granting a lease to an alleged assignee of the applicant against the protest of such applicant; he can only refuse the lease (l). And the representatives of a deceased applicant who died before the execution of the lease within the time prescribed by the regulations (m) were held, prior to the passing of the Act No. 1514, to have no legal or equitable interest in such

To whom lease granted.

(c) *Per Molesworth, J., in Hitchins v. The Queen*, 4 W.W. & A'B. (E.) 133 (1867).

(d) *City of Melbourne G.M. Co. v. The Queen*, 4 W.W. & A'B. (E.) 148 (1867).

(e) 57 Vic. No. 24 (Tas.), sec. 147.

(f) *Rosebery G.M. Co. v. Minister of Mines*, Hore Dig. (Tas.) 78 (1895).

(g) 54 Vic. No. 1080.

(h) *City of Melbourne G.M. Co. v. The Queen*, *supra*.

(i) *Aladdin G.M. Co. v. Aladdin*

and *Try Again United G.M. Co.*, 6 W.W. & A'B. (E.) 266 (1869).

(j) Under New South Wales Mining Act, 25 Vic. No. 13 (N.S.W.).

(k) *Lyons v. Moore*, 3 N.S.W. L.R. (L.) 379 (1882).

(l) *Aladdin G.M. Co. v. Aladdin and Try Again United G.M. Co.*, *supra*. See Act No. 1514, sec. 48, authorising assignment of interest in an application for lease.

(m) See Leasing Regulations, cl. 32.

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Sec. II.

lease, if applied for by the applicant as manager of and on behalf of a company (*n*).

Waiver of compliance with regulations.

Under section 67 of the Act No. 1120 the Governor has power to grant a lease notwithstanding that the applicant may not in all respects have complied with the leasing regulations. This, however, relates to waiving objections before execution by the Governor, and not before execution by the lessee. After execution by the Governor, and before execution by the lessee, the lease according to the regulations operates by way of escrow. If such regulations are *ultra vires* section 77 of No. 1120 the lease is altogether inoperative (*o*).

When lease takes effect.

A lease under the Mining Act of New South Wales, as a lease, takes effect only from the time of its execution (*p*).

Attestation of execution.

It was not necessary to the validity of a lease (*q*) executed by the Governor's delegate that the witness should add his residence and occupation, nor were sealing and delivery necessary (*r*).

SECTION III.—MARKING FOR A CLAIM PENDING APPLICATION FOR LEASE.

Act No. 446.

The Act passed to amend *The Mining Statute 1865* (*a*) had the effect of materially altering the position between persons marking as for a lease, and persons marking as for a claim. It was held in the case of *Perkins v. Hercules G.M. Co.* (*b*) that an application by a claimholder for a lease of the ground covered by the claim did not exempt the

(*n*) *Forrester v. Great Western Long Tunnel G.M. Co.*, 13 V.L.R. 381; 8 A.L.T. 177 (1887); *Wissing v. Finnegan*, 3 V.R. (M.) 16; 3 A.J.R. 126 (1872); but see Act No. 1514, sec. 48.

(*o*) *Finnegan v. Wissing*, 4 A.J.R. 65 (1873).

(*p*) *King v. McIvor*, 4 N.S.W. L.R. (L.) 43 (1882). See Leasing

Regulations (Vic.), cl. 27, 30.

(*q*) Granted under Act 30 Vic. No. 32 (N.Z.), sec. 41.

(*r*) *Costello v. O'Donnell*, 1 N.Z. L.R.C.A. 105 (1882). See Act 62 Vic. No. 38 (N.Z.), Part IV.

(*a*) 36 Vic. No. 446 [incorporated with the Act No. 1120].

(*b*) 5 W.W. & A'B. (M.) 48 (1868).

ground from forfeiture otherwise incurred under the operation of the by-laws; and the application for a lease by a claimholder of the ground comprised in his claim did not under section 37 of the Act No. 291 (No. 1120, sec. 65) protect the claim from forfeiture incurred either before or after the application on the ground of abandonment or breach of a by-law (c), for the concluding words of section 65 show that all that is meant is that no taking up is good as against the lessee. The protection afforded by the application was only *quoad* the applicant for the lease, and the application for a lease did not prevent any person taking up the ground as a claim under miner's right. In case the lease should be granted, the lessee could proceed for trespass and restitution of the gold taken out of the leased ground (d). Thus, under section 65, trespass by marking out ground pending an application for a lease is not a trespass against the whole world, but only against the applicant for the lease, and a third party cannot take advantage of it (e).

The case of *Bain v. McColl* (f), which was decided before the passing of the Act No. 446, serves to show the position as between a claimholder and an applicant for a lease, with regard to section 65 of the Act No. 1120. Defendant, who was the holder of a miner's right, on August 10, 1871, applied for a lease of his claim and other ground, and obtained the recommendation of the Warden that it should issue. The plaintiff then, on March 1, 1872, obtained a decision of abandonment by the Warden, marked out the land as a claim, and sunk a shaft on it. Defendant summoned him for trespass pending the application for the lease, and the judge of the Court of Mines decided against him (the applicant), as he had failed to comply with the leasing regulations. Some months afterwards, on October 28, 1872, the Governor executed the lease, and it was

(c) *Smith v. Golden Gate Co.*, 5 W.W. & A'B. (M.) 5 (1868); *Rendall v. Hadley*, 2 V.R. (M.) 21; 2 A.J.R. 105 (1871).
 (d) *Barker's G.M. Co. v. Keating*, 1 V.R. (M.) 18; 1 A.J.R. 55 (1870).
 (e) *Gorman v. McLellan*, 14 V.L.R. 674; 10 A.L.T. 51 (1888).
 (f) 4 A.J.R. 62; 5 A.J.R. 17 (1873).

*Bk. II. Ch. II.
 Sec. III.*

No. 291, s. 37.

Bain v. McColl.

*Bk. II. Ch. II.
Sec. III.*

Trespass under
No. 201, s. 37.

executed on November 18 following by the defendant, who thereupon forcibly ejected the plaintiff, who then sued defendant for trespass. It was held that section 65 explained section 49 so as to make a person intruding on the ground pending the application liable if the lease were afterwards granted, yet he would not be so if the applicant had made default in complying with the leasing regulations, but that it was not necessary that the applicant should sue every intruder before taking the lease; it would be sufficient if the latter were liable before the lease was issued; and further, that though section 67 authorised the Governor to issue leases when there has not been full compliance with the leasing regulations, this qualifies the restriction in section 49 against granting leases to persons not complying with the regulations as between them and the Crown or the public, but does not so qualify section 65 as to making a person having a lawful title before the lease lose his title and be made a trespasser retrospectively (*g*).

Proof of compliance with regulations.

An applicant for a lease taking proceedings against a trespasser pending the decision of his application was bound under section 65 of the Act No. 1120 to prove compliance with all the regulations in force respecting his application (*h*); and this will apply as well under sections 70, 71 (*i*).

Marking for claim pending application.

The Act No. 446, passed on December 17, 1872, however, provided that pending any application for a lease or licence under the provisions of the Act No. 1120, Part I, it should not be lawful to mark out as a claim, or to include within the boundaries of any claim, the land applied for, or any part thereof, and no such marking out should confer any right or title to the said land; and any person who shall enter upon such land for the purpose of marking out the same shall be deemed to have trespassed or encroached

(*g*) See now Act No. 1120, secs. 70, 71, referred to *post*, as to determination of the application when default is made by the applicant.

(*h*) *Craig v. Adams*, 3 W.W. & A.B. (M.) 19 (1866).

(*i*) *Barton v. Band of Hope and Albion Consols* (2), 5 V.L.R. (M.) 47; 1 A.L.T. 95 (1879); *Antony v. Dillon*, 15 V.L.R. 240; 10 A.L.T. 231 (1889).

thereon within the meaning of section 65 of the Act No. 1120 (*j*); and the pendency of an application shall begin with the marking out of the land by the applicant, and continue until the Governor grants or refuses the same, but the pendency of the application will cease if the applicant does not comply with the regulations (*k*), except by permission of the Minister. But any applicant for a lease of land consisting wholly or in part of a claim may purchase such claim and work the same as a claim pending the application (*l*).

*Bk. II. Ch. II.
Sec. 111.*

Thus, though under the Act No. 1120, secs. 49, 65, marking out for a lease does not stop the power of acquiring title to a claim by marking out, except as to the rights of those previously marking for a lease (*m*), yet sections 70 and 71, passed since the decision of *Barker's G.M. Co. v. Keating* (*m*) was given, meets the case, and makes marking out for a claim pending the application for a lease ineffectual for all purposes (*n*). There would appear to have been some doubt as to whether marking out a claim on land a lease of which had been applied for could be deemed an entry on, or interference with, such land within the meaning of section 65; if not, the first part of section 70 was not required at all, though no doubt this section was passed to meet the case, and resolve any doubt upon the point (*o*).

Ineffectual for all purposes.

Under the Goldfields Act of Western Australia (*p*) and the regulations thereunder an alluvial miner has the right to enter upon a lease to search for and obtain alluvial gold, and to mark out a claim, but he has no exclusive right to work upon the portion of the leasehold marked out by him,

Permitted in Western Australia.

(*j*) Act No. 1120, sec. 70, consolidating No. 446, sec. 3.

(*k*) Act No. 1514, sec. 50; as to what is a default, see *Constable v. Pigtail Q.M. Co.*, 3 V.L.R. (M.) 7 (1877); *Barton v. Band of Hope and Albion Consols*, *supra*; *Great Northern Co. v. Brown*, 8 V.L.R. (M.) 1; 3 A.L.T. 89 (1882); *Holmes v. Reynolds*, 11 V.L.R. 711 (1885); and see *ante*, Sec. I, "REQUIREMENTS

PRELIMINARY TO GRANTING OF LEASES."

(*l*) Act No. 1120, sec. 72.

(*m*) *Barker's G.M. Co. v. Keating*, 1 V.R. (M.) 18; 1 A.J.R. 55 (1870).

(*n*) *Weddell v. House* (2), 9 V.L.R. (M.) 13; 4 A.L.T. 179 (1883).

(*o*) *Gorman v. M'Lellan*, 14 V.L.R. 674; 10 A.L.T. 51 (1888).

(*p*) 59 Vic. No. 40 (W.A.).

*Bk. II. Ch. II.
Sec. III.*

and no action will lie at the suit of the claimholder against the leaseholder for alluvial gold removed by the latter (*q*).

Warden may
make order
for possession.

Thus, section 70 of the Act No. 1120 prohibits all means of acquiring a claim whilst the defendants are applicants for a lease of the same ground (*r*), but does not prohibit the Warden from making an order putting complainant in possession as against a defendant pending an application by a third party for a lease (*s*); nor as against the applicant for the lease, but in such case the complainant will be left to meet the liabilities for trespass in marking out contained in the section; that is, the liability to be declared a trespasser unless default in the application can be shown (*t*).

Working not
necessary to
constitute
trespass.

In order to constitute a trespass under section 70 of the Act No. 1120 it is not necessary that a person entering on the land subject of the application for a lease should work or mine on it; the fact of entering to mark out constitutes a trespass. The latter words of the section have the effect of making it clear that a mere entry for marking out, without occupying or otherwise interfering with the land so as to cause actual damage, should be a cause of action for trespass before the Warden (*u*); but when such land is marked out as a claim, it is necessary for the applicant for a lease of the land to prove compliance with the leasing regulations prior to the marking out under the miner's right. If a default in the application be proved, the marking out for a claim will be good as against the application for the lease (*v*).

Proceedings
for forfeiture
before the
Warden.

However, though a person is prohibited from entering on and marking out for a claim land the subject of an application for a lease without being deemed a trespasser, he may proceed against a claimholder applying for a lease of his claim, for forfeiture of the ground as a claim, and though

(*q*) *Scott v. Payne*, 1 W.A.L.R. 129 (1889); *Wright v. Peak Hills Goldfields Limited*, *ibid.*

(*r*) *Hutcheson v. Erk*, 3 V.L.R. (M.) 1 (1872).

(*s*) *Reg. v. Orme, ex parte Droscher*, 3 V.L.R. (L.) 343 (1877). See hereon *Cock v. Stawell Amalgam-*

ated Scotchman's and Cross Reefs Q. M. Co., 24 V.L.R. 165; 4 A.L.R. 219; 20 A.L.T. 95 (1898).

(*t*) *Jolly v. Stephens*, 5 A.J.R. 169 (1874).

(*u*) *Hutcheson v. Erk*, 3 V.L.R. (M.) 1 (1872).

(*v*) *Autony v. Dillon*, 15 V.L.R.

under sections 70, 71 of the Act No. 1120 an application for a lease is sufficient to prevent an order of forfeiture for non-working, unless default in complying with the leasing regulations be shown (*w*), and though the Warden should not pending the application for the lease put persons in possession, he should not dismiss the complaint, but adjourn from time to time under Act No. 1120, sec. 219 until the question of granting or refusal of the lease is decided, and he has jurisdiction to grant an injunction against mining until the application for the lease is disposed of (*x*).

*Bk. II. Ch. II.
Sec. III.*

An application for a lease is therefore only a provisional title. If the lease is refused it is just the same as if the application had not been made, and the Warden can then put a complainant in possession in the same manner as if a default in the application had been proved (*y*).

Application a provisional title.

A title obtained in contravention of section 70 is bad. Where land was marked out for a lease, and was subsequently marked out for a claim while the application for the lease was pending, it was held that the holders of miners' rights suing for illegal occupation might insist under section 70 that the title of the defendants was bad, as obtained during the application for the lease, even though the lease was ultimately refused (*z*).

Title in contravention of No. 446.

It must be borne in mind that trespass under section 70 consists only of entering to mark out the ground applied for under lease as a claim, and therefore in proceeding for forfeiture or illegal occupation before the Warden pending the application for a lease the section is not contravened, inasmuch as marking out is not a condition precedent to a proceeding before the Warden (*a*). As, however, marking out is necessary after the Warden's adjudication (*b*), even an

Marking out not necessary in proceeding before the Warden.

240; 10 A.L.T. 231 (1889).

(*w*) *Constable v. Pigtail Q.M. Co.*,

3 V.L.R. (M.) 7 (1877).

(*x*) *Hutcheson v. Erk*, 3 V.L.R.

(M.) 1 (1877).

(*y*) *Barker's G.M. Co. v. Keating*,

1 V.R. (M.) 18; 1 A.J.R. 55 (1870).

(*z*) *Weddell v. Howse* (2), 9 V.L.R. (M.) 13; 4 A.L.T. 179 (1883).

(*a*) *Kilgour v. Flinn*, 5 W.W. & A'B. (M.) 32 (1868).

(*b*) *Beavan v. Rigby*, 2 V.L.R. (M.) 7 (1876); *Moore v. White*, 4 A.J.R. 17 (1873).

*Bk. II. Ch. II.
Sec. III.*

order for possession will not authorise entry to mark out pending the application for the lease, and thus a person obtaining an adjudication of forfeiture cannot take possession by marking. The refusal of the lease will, however, enable the Warden to order forfeiture and possession, and the complainant can then enter and mark out the claim, his title being thus in abeyance pending the granting or refusal of the lease.

SECTION IV.—PRIORITY OF LEASES.

What gives
priority.

Gold-mining leases are granted according to priority of application, which priority is determined according to the time at which each application shall have been received by the Warden as endorsed on the application. If there are any reasons why priority should be granted to one application lodged subsequently to another the Governor is the sole arbiter, and it lies in his absolute discretion which application, if any, shall be granted (*a*). It is only in this latter manner that priority of marking out can take precedence of priority of application.

Priority
preserved.

A person who first applied for a lease in accordance with the Act and regulations (*b*) was held to have acquired a right which could not be taken away by the place being subsequently proclaimed a goldfield (*c*).

Occupier under
miner's right.

A person legally occupying under his miner's right land subject of an application for a lease has priority of title over the application, unless he consent to such application (*d*). So, in South Australia he has a preferent right to a lease (*e*). And mere taking possession by pegging out a claim is good

(*a*) Leasing Regulations, cl. 8; see *Mills v. Day Dawn Block G.M. Co.*, 1 Q.L.J. 98 (1882).

(*b*) Under the Goldfields Act of 1866 (N.S.W.).

(*c*) *Bacon v. Reborra*, 12 N.S.W. S.C.R. (L.) 134 (1873); compare

Act 37 Vic. No. 13 (N.S.W.), sec. 33.

(*d*) *Greenhill v. Braidley*, 4 V. L.R. (M.) 5 (1878).

(*e*) 56 & 57 Vic. No. 587 (S.A.), sec. 32; see Act No. 1120, sec. 68.

as against a person subsequently marking out for a lease, although the claim may not be registered until after the marking out for the lease; and as between a party applying for a claim and a party applying for a lease, a mistake made by the applicant for the claim in his notice of application, as to the time of taking possession, cannot be taken advantage of by the applicant for the lease (*f*).

Bl. II. Ch. II.
Sec. IV.

In fact the question of priority between one person marking for a lease and another person marking for a claim will not arise until all the preliminary requirements are completed, and such priority will date, as to the person marking for a lease, not from the time when he pegged out the land, but from the time when he has fully complied with the leasing regulations as to painting the posts and affixing the metal plates (*g*).

Priority as to persons marking out.

And where a person has no legal title, but is in possession of Crown lands under his miner's right, a lease of which has been applied for by others, the title of the applicant for the lease remains in abeyance until the lease is granted. If it is refused the occupier may bring an action against the applicant for trespass or encroachment committed during the pendency of the application (*h*).

Possession under miner's right without title.

An applicant for a lease has no right to mine on the land applied for before the lease is granted, and any such mining is an unauthorised trespass on public property (*i*); but the applicant may defend his inchoate title, and may restrain other persons from mining on the ground (*j*).

No right to mine before lease granted.

An application for a mining lease of land already held by another person under lease, made in anticipation of the expiration of the term of the current lease, is ineffectual;

Marking in anticipation of expiry of lease.

(*f*) *Greenhill v. Bradley, supra.*

(*g*) *Clarence United Co. v. Goldsmith*, 8 V.L.R. (M.) 14; 3 A.L.T. 147 (1882).

(*h*) *Fahy v. Koh-i-noor Q.M. Co.*, 3 W.W. & A'B. (M.) 4 (1866).

(*i*) See Act No. 1120, sec. 287.

(*j*) *Att-Gen. v. Sanderson*, 1 V.R. (E.) 18; 1 A.J.R. 21 (1870); *Robertson v. Morris*, 7 V.L.R. (M.) 1; 2 A.L.T. 109 (1881).

Bk. II. Ch. II.
Sec. IV. the first step to be taken in applying for a lease is to mark out the ground, and such marking during the currency of an existing lease would be a trespass on the leased land. And even were this done by the lessee himself during his current lease, or with his consent, the application for a new lease must be refused, as the Crown cannot grant reversionary leases applied for before the expiry of a current lease (*k*). And of course this principle would apply to a lessee marking out as seeking a renewal of his lease; neither before the passing of *The Residence Areas Act 1881* (*l*) could the Crown grant a lease of land comprised in a residence area previously acquired, without the consent of the occupier (*m*).

SECTION V.—APPLICATION BY HOLDERS OF MINERS' RIGHTS TO AVOID LEASES.

The labour
covenant.

Every mining lease must contain a covenant by which the lessee binds himself to keep *bonâ fide* employed on the land a prescribed number of able and competent workmen and miners, not being Chinese, unless prevented by inevitable accident, or during the execution of repairs (*a*).

Procedure.

When a breach of the labour covenant in a lease has been committed by the lessee, any holder of a miner's right may apply to the Minister of Mines to have the lease declared void, and a lease of the land issued to the applicant (*b*). The mode of procedure is by an application to the Minister in the form set out in the second schedule to the Act No. 1514, and the Minister may, if he think fit, refer the application to the Warden with instructions to hold a public

(*k*) *Durant v. Jackson*, 1 V.L.R. (M.) 6 (1875).

(*l*) No. 1120, Part I (4).

(*m*) *Jones v. Christensen*, 7 V.L.R. (M.) 6; 2 A.L.T. 149 (1881). See *post*, Bk. III, Ch. IV, Sec. II, "RESIDENCE AREAS." A clause was inserted in *The Residence Areas Act* to meet the judgment in this case (No. 1120, sec. 46), which

enacts that a lease conferring the right to mine below the surface of a residence area is as valid and effectual as if granted with the consent of the occupier.

(*a*) Act No. 1514, sec. 30; compare 56 & 57 Vic. No. 587 (S.A.), sec. 52 (ii), 108.

(*b*) Act No. 1514, sec. 31.

enquiry concerning the alleged breach. The Warden is required to give such notice to the parties as he thinks necessary, and proceeds on the day and at the place named by him in such notice to hold an enquiry concerning the breach, either *ex parte* or otherwise, and makes his report thereon to the Minister (c), forwarding with such report all evidence taken on the enquiry, and his remarks on the case. Either party may appeal to the Minister against the recommendation of the Warden (d).

*Bk. II. Ch. II.
Sec. V.*

A person taking proceedings for forfeiture of a lease is not required to mark out the ground as he would be required to do in applying for a lease in the first instance under the regulations (e).

Marking out not necessary.

The Warden cannot determine a forfeiture, and put the applicant in possession. All he has to do is to enquire into the reality of the forfeiture or alleged breach of covenant. If he finds that a breach has been committed and a forfeiture incurred, and his finding is affirmed by the Minister, the granting of the lease applied for is a premium to the person giving the information which leads to the forfeiture (f). The object of the Act is to prevent "shepherding" leases, and as the Governor-in-Council has authority to determine the matter of forfeiture and of granting a lease to the applicant (g), the granting of a lease under these sections is entirely within his own discretion, and generally an equitable decision may be looked for rather than a strict legal judgment as to the reality or otherwise of the forfeiture.

Duty of Warden.

If the lease be declared void, the former lessee may at any time within three months from the publication of such forfeiture in the *Gazette* remove any plant, machinery, or tools belonging to him on the land, but not timber used in and for supporting any of the shafts or drives in the mine (h);

Removal of plant by former lessee.

(c) Act No. 1514, sec. 32.

(d) *Ibid*, sec. 33.

(e) *Robertson v. Morris*, 7 V. L. R.

(M.) 1; 2 A. L. T. 109 (1881).

(f) *Ibid*.

(g) Act No. 1514, secs. 35, 36.

(h) *Ibid*, sec. 38.

Bk. II. Ch. II. Sec. V. and the new lessee has the right after a certain time and subject to certain conditions to purchase the plant and machinery (*i*).

Payment for work done.

The Warden is required to take evidence on the enquiry before him respecting the value to the applicant of any work done on or in or beneath the leased land, which in the opinion of the Warden is necessary or available for future mining operations; and if the lease is declared forfeited the applicant must pay such ascertained value to the Warden for and on behalf of the former lessee (*j*). But no compensation will be allowed for work or labour done in the mine if it be proved that a continuous breach has been committed for a period of twelve months previous to the application (*k*).

Suspension of labour covenant.

The Minister has power to grant suspension of the labour covenant, and if he does so notice thereof is to be given and posted as prescribed by the Act (*l*).

SECTION VI.—LEASES OF RESERVED LANDS.

Grant of leases.

The Governor has power to grant leases of mines under lands granted or reserved for railways, water-works, public parks, places of recreation, or other public purposes (*a*), subject to the regulations, and with the consent of the Board of Land and Works or railway commissioner in whom the same are vested (*b*).

Mode of application.

The application is made under the general leasing regulations, as reserved lands are classed with Crown land for the purposes of an application for a mining lease (*c*); but the

(*i*) Act No. 1514, sec. 37.

(*j*) *Ibid*, sec. 39.

(*k*) *Ibid*, sec. 40.

(*l*) *Ibid*, sec. 42. A like power is given by the Mining Acts of New South Wales (Regs. under 37 Vic. No. 13 (N.S.W.), cl. 47); South

Australia (56 & 57 Vic. No. 587 (S.A.), sec. 106); and Western Australia (59 Vic. No. 40 (W.A.), sec. 45; Regs., cl. 102).

(*a*) Act No. 1120, sec. 53.

(*b*) Act No. 1514, sec. 27.

(*c*) *Ibid*, sec. 29.

application and accompanying documents must be submitted to the Governor and the Board of Land and Works, or the railway commissioner if the land be vested in him, for approval and consent (*d*). Bk. II. Ch. II. Sec. VI.

If there be no objection lodged the application is dealt with as an ordinary unopposed application, subject to the above approval and consent. If, however, an objection be lodged under reg. 12 the Warden will hold an enquiry into the application and any objections thereto, in the same manner as on an application for a gold-mining lease of Crown land, and transmit the evidence taken by him, and his opinion thereon, to the Minister of Mines (*e*). The evidence so taken is submitted to the Governor-in-Council, who alone in his absolute discretion determines as to the granting or refusal of the lease. Where no objection.

A lease of reserved lands may include, or may be consolidated with, a lease of any other class of land, and is subject to the same rules as to conditions of labour, forfeiture for breach of covenant, term and rent, as leases of Crown lands, and subject generally to the covenants and conditions prescribed by the regulations which shall be in force at the time of granting the lease (*f*). Subject to regulations.

(*d*) Leasing Regulations, cl. 45, 46.

(*e*) *Ibid*, cl. 19.

(*f*) Act No. 1514, sec. 29.

CHAPTER III.

FORFEITURE OF GOLD MINING LEASES.

SEC. I.—WHAT WILL CONSTITUTE
FORFEITURE.

SEC. II.—MEANS OF ENFORCING FOR-
FEITURE.

SECTION I.—WHAT WILL CONSTITUTE FORFEITURE.

Bk. II. Ch. III.
Sec. I.
Breach of labour
covenant.

ALL mining leases issued under the *Mines Acts* and the regulations contain a covenant on the part of the lessee that he will use the leased land *bonâ fide* for the purpose for which it has been demised, and provide for the employment in the mining operations on or under the leased land during the term of the lease and during the usual hours of labour a certain number of able and competent workmen (*a*); and a proviso that if and whenever there shall be a breach of or non-compliance with the covenants and conditions therein contained on the part of the lessee, the Governor-in-Council, who alone shall finally judge and determine the matter upon the evidence or reports submitted to him by the Minister of Mines, may declare the lease void (*b*); and on publication in the *Gazette* of notice of such declaration, all the right, title, and interest of the lessee shall cease and determine both at law and in equity (*c*).

(*a*) Act No. 1514, sec. 30.

(*b*) Leasing regulations, Sched. G.

(*c*) As to forfeiture of leases in other States, see 56 & 57 Vic. No.

The time at which a *Gazette* notice of forfeiture of a lease operates is from the time of the *Gazette* being fully printed, not published, and a person marking out a claim on the leased land in anticipation of the publication, which is subsequently confirmed, although he may not have been informed of the actual publication when marking off the ground, is entitled to have the benefit of it (*d*). Bk. II. Ch. III.
Sec. I.
When the
Gazette notice
operates.

However, a lease is made only voidable by the Crown for non-performance of the covenants in the manner prescribed, and is not made void so that an individual can claim to be put in possession (*e*). Lease not void
but voidable.

A holder of a miner's right who has not entered into possession cannot bring an action to have the interest of persons in possession of land under a gold-mining lease from the Crown declared void on the ground that the lease was improperly granted, or that there was a defect in the grant (*f*). Action by holder
of miner's
right.

In the well-known case of *Barwick v. Duchess of Edinburgh Co.* (*g*), previously referred to, it was questioned whether recovery of possession by the Crown was necessary to complete the forfeiture of a gold-mining lease, and Higinbotham, J., held that section 75 of the Act No. 1120 (*h*) contemplated such a recovery as necessary, even as regards the Crown; and as regards the mining public, that recovery of possession by the Crown, or an adjudication of forfeiture (*i*) was an essential preliminary to the power to mark out under miner's right the land of a lessee who remained in possession after his lease had been declared *Barwick v.*
Duchess of
Edinburgh Co.

587 (S.A.), sec. 105; 59 Vic. No. 40 (W.A.), sec. 45, and 62 Vic. No. 16 (W.A.), sec. 7; Regs. under 37 Vic. No. 13 (N.S.W.); 62 Vic. No. 24 (Q.), sec. 28; 57 Vic. No. 24 (Tas.), sec. 43; 62 Vic. No. 38 (N.Z.), sec. 157.

(*d*) *Clarence United Co. v. Goldsmith*, 8 V.L.R. (M.) 14; 3 A.L.T. 147 (1882).

(*e*) *M'Millan v. Dillon*, 6 V.L.R. (M.) 15; 1 A.L.T. 203 (1880).

(*f*) *Osborne v. Morgan*, 2 Q.L.J. 113 (1886); 13 App. Cas. 227 (1888), followed in *Cock v. Stawell Amalgamated Scotchman's and Cross Reefs G.M. Co.*, 24 V.L.R. 165; 4 A.L.R. 219; 20 A.L.T. 85 (1898).

(*g*) 8 V.L.R. (E.) 70; 3 A.L.T. 68, 121 (1882).

(*h*) Act No. 291, sec. 42.

(*i*) See hereon *Cock v. Stawell Amalgamated Scotchman's and Cross Reefs G.M. Co.*, *supra*.

Bk. II. Ch. III.
Sec. I.

forfeited. After the Crown has recovered possession, the land might be marked out, as it could be after the tenancy had terminated and the tenant had quitted possession; and although possession be not recovered by the Crown the holder of a miner's right may proceed by complaint before the Warden, and upon due proof by him of the forfeiture he will be entitled to an adjudication; but there is no authority for saying that before forfeiture by the Crown has been completed by possession recovered, or before adjudication of forfeiture by a court, land liable to be forfeited, or declared to be forfeited, but still in the possession of the tenant, can be forcibly taken from him by a stranger. The rule of common law is strongly opposed to this view, and the statute law supports and does not limit the common law right of a person in possession of land. Naked possession constitutes at common law a good title against a stranger, upon which trespass will lie; thus, a tenant at sufferance, and a person having possession under a lease which has been declared void by Act of Parliament, can maintain trespass against a stranger. Therefore, any marking out of the land previous to recovery of possession by the Crown is premature, and confers no title; persons marking out are in fact trespassers. So, under the New South Wales *Lands Alienation Act* 1861, upon default of payment of balance on a mineral conditional purchase, the land did not revert to the Crown until the Crown had made a declaration of forfeiture (*j*); and non-compliance with the regulations did not *ipso facto* work a forfeiture, but some act of the Crown evidencing its intention to forfeit was necessary (*k*).

N. S. Wales.

Recovery of
possession by
the Crown.

On appeal from the decision of Higinbotham, J., in the above case it was held by the Full Court (Williams, J. *dissentiente*) and affirming the decision of the primary judge, that a declaration of forfeiture of a lease by the Governor-in-Council by *Gazette* notice for breach of the labour

(*j*) *Martin v. Baker*, Knox (N.S. W.) 418 (1877).

(*k*) *Chappell v. Samper*, 11 N.S.W. S.C.R. (L.) 138 (1872).

covenant did not avoid the lease until some person representing the Crown had taken some step to determine it; that lessees were in the position of persons whose leases are proved to be void on breach of covenant, which means voidable at the option of the lessor; and that the rights of the Crown to rent, and of the lessee to possession, remained unchanged until some act was done by the Crown to determine the lease (*l*).

*Bk. II, Ch. III.
Sec. I.*

But on the forfeiture of a gold-mining lease by *Gazette* notice declaring such lease to be void, it is not competent for anyone other than the lessee to take the objection that the lease has not been actually determined until re-entry by the Crown (*m*).

Only the lessee can take objection.

Payment of rent after breach of covenant is binding on the Crown when accepted, although the officer by whom the rent was received may have been ignorant of breaches of covenant, or that the receipt of the rent would waive a forfeiture. But receipt of rent by the Crown is not a waiver of continuous forfeitures (*n*).

Effect of payment of rent.

The publication of new leasing regulations will not affect a lease held under regulations which are repealed by such new regulations, and the same principle applies to leasing regulations as applies to mining board by-laws, viz., that a lease is held under the regulations under which it is granted, notwithstanding their subsequent repeal; regulations made under a repealing Act cannot vary the terms of a lease granted under the repealed Act, and create a new mode or evidence of forfeiture. Thus, a gold-mining lease is not subject to regulations afterwards published, so as to make notice of forfeiture gazetted under such regulations evidence that the lessee has forfeited his lease (*o*).

Where regulations repealed.

(*l*) *Barwick v. Duchess of Edinburgh Co.*, *supra*; and see *Weddell v. Howse* (1), 8 V.L.R. (M.) 44; 4 A.L.T. 95 (1882).

(*m*) *Weddell v. Howse*, *supra*.

(*n*) *Per Higinbotham, J.*, in *Barwick v. Duchess of Edinburgh Co.*,

supra, quoting *Thorburn v. Buchanan*, 2 V.R. (L.) 169 (1871), and *Ettershank v. The Queen*, 4 A.J.R. 11, 132 (1873); this question was not argued on the appeal.

(*o*) *Johnson v. Thomson*, 6 W.W. & A'B. (M.) 18 (1869).

Bk. II. Ch. III.
Sec. I.

Parties to
action.

It was held under the Queensland Mining Act that in an action to set aside the forfeiture of a lease and to recover possession the Minister for Justice should not be joined as a party (*p*).

SECTION II.—MEANS OF ENFORCING FORFEITURE.

Power of
Governor to
declare lease
void.

Gold-mining leases can only be declared void by the Governor-in-Council (*a*) whose discretion in the matter is absolute and unchallengeable, and, as we have seen, it is necessary that the Crown should take some step to assert possession before the forfeiture is complete (*b*), such as drawing the posts erected by the lessee on his application, to be effected by some duly authorised person. Under the Tasmanian Act (*c*) the forfeiture of a lease is entirely at the discretion of the Crown; the Supreme Court cannot make either a grant or a forfeiture (*d*).

Tasmania.

When power
may be
exercised.

The power vested in the Governor of avoiding a mining lease may be exercised—

1. During the progress of the application for the lease, and before the execution of it by the Governor, in which case the application may be declared abandoned;

2. After execution by the Governor, and before execution by the applicant, when the lease is declared to be void; or,

3. Where the applicant is stated to have abandoned, or is to be deemed to have abandoned, his application, or where the lease is void, or is deemed to be void (*e*).

Application by
holder of
miner's right.

Under the Act No. 1514, Part I, sub. 4, any holder of a miner's right may apply for the land the subject of a gold-

(*p*) *Kirkbride v. Minister for Justice and New Day Dawn Freehold G.M. Co.*, 3 Q.L.J. 163 (1889).

(*a*) Leasing Regulations, cl. 35, 36; Act No. 1514, sec. 35.

(*b*) *Barwick v. Duchess of Edinburgh Co.*, 8 V.L.R. (E.) 70; 3 A.L.T. 98, 121 (1882); *Weddell v.*

Howse (1), 8 V.L.R. (M.) 44; 4 A.L.T. 95 (1882).

(*c*) 57 Vic. No. 24 (Tas.), sec. 43.

(*d*) *In re Commissioner of Mines*, Hore Dig. (Tas.) 78 (1896).

(*e*) Leasing Regulations, cl. 35, 36; see also cl. 53.

mining lease, on a breach of the labour covenant contained in such lease. The application, which is to be enquired into by the Warden, is submitted to the Governor-in-Council (*f*), who may if the lease is declared void, in the name and on behalf of the Queen, grant to the applicant a lease of the whole or any portion of the land held under the determined lease, without the necessity of a formal application as for a new lease, or the applicant may mark out as a claim the whole or any portion of the land; and no person other than the applicant is entitled to enter on or mark out the land for a period of fourteen days from the date of the publication of the *Gazette* notice of avoidance, or pending the issue of the new lease (*g*).

*Bk. II. Ch. III.
Sec. II.*

Land held under a gold-mining lease or the subject of an application for lease is protected from occupation as a claim under miner's right (*h*), and no one can mark out or take possession of the leased land before re-entry by the Crown, without obtaining an adjudication by a competent court in his favour (*i*).

Protection granted by lease.

The Warden has jurisdiction in a complaint by a holder of a miner's right to be put in possession as a claim of ground held under mining lease, and can if the complainant has a right to recover the leased land declare a forfeiture of such land for non-compliance with the labour covenants, but the holder of a miner's right cannot enforce forfeiture of a lease held by a defendant for non-compliance with the labour covenants until the lease has been legally forfeited by the Governor-in-Council (*j*).

Jurisdiction of Warden.

But the Warden has no jurisdiction to make a merely declaratory order under *The Supreme Court Act* (*k*) that

Cannot make declaratory order.

(*f*) Act No. 1514, sec. 34.

(*g*) Act No. 1514, sec. 36. See the judgment in *Robertson v. Morris*, 7 V.L.R. (M.) 1; 2 A.L.T. 109 (1881), containing an exhaustive summary of the regulations 44-47 of 1871 (now enacted in Act No. 1514, Part I, sub. 4); and see *ante*, Ch. II, Sec. V, "APPLICATION BY HOLDERS OF MINERS' RIGHTS TO AVOID

LEASES."

(*h*) Act No. 1120, secs. 65, 70.

(*i*) *Weddell v. Howse* (1), 8 V.L.R. (M.) 44; 4 A.L.T. 95 (1882).

(*j*) *M'Millan v. Dillon*, 6 V.L.R. (M.) 15; 1 A.L.T. 203 (1880); *Barwick v. Duchess of Edinburgh Co.*, 8 V.L.R. (E.) 70; 3 A.L.T. 68, 121 (1882).

(*k*) 54 Vic. No. 1142, sec. 63 (5 b).

Bk. II. Ch. III.
Sec. II.

the holder of a lease has not complied with the labour covenants (*l*), and thus leave it open to the complainant on due forfeiture of the lease to apply to the Warden to be put in possession.

Death of lessee
before execution
of lease.

Where, however, a lessee, who was manager of a company and applicant for a lease for such company, died after execution of the lease by the Governor, and before execution of it by the lessee, and the representatives of the lessee did not obtain permission to execute the lease in his stead within the sixty days prescribed by Reg. 28 of 1871, it was held that the Warden had jurisdiction to hear and determine a complaint by the holder of a miner's right to be put in possession of the ground (*m*).

Execution
within the
prescribed time.

And on appeal from the Warden to the Court of Mines, the judge of which court stated a case for the opinion of the Chief Judge, it was held that section 67 of the Act No. 1120 would not operate to render valid a lease which had not been executed within the prescribed time, as against a person who obtained possession from the Warden after the time had elapsed, and before the execution of the lease (*n*).

Wissing v.
Finnegan.

In the case referred to, defendant applied for a lease under the regulations, and notice was published in the *Gazette* (reg. 28 of 1871—see reg. 27 of 1897) requiring the lessee to execute the lease within sixty days, or it would be void, and the lessee did not execute the lease within that time, and plaintiff, being the holder of a miner's right, proceeded before the Warden for a declaration of forfeiture and possession. Defendant was allowed to execute the lease after the proceedings before the Warden had been instituted. It was held that the execution by the Governor operates only by way of escrow, dependent for completion on execu-

Execution by
Governor an
escrow.

(*l*) *Ives v. Lator*, 13 V.L.R. 941 ; 9 A.L.T. 98 (1887), explaining *Mc.Millan v. Dillon*, *supra*.

(*m*) *Forrester v. Great Western Long Tunnel G.M. Co.*, 13 V.L.R. 331 ; 8 A.L.T. 177 (1887). But now in the event of the death of an

applicant before the lease is executed such lease may be executed by his executor or administrator ; Act No. 1514, sec. 48.

(*n*) *Finnegan v. Wissing*, 4 A.J.R. 65 (1873).

tion by the lessee within the time prescribed by the regulations; and that the Warden had authority to question the power of the Governor to allow execution by the lessee making a lease effectual after the expiration of the prescribed sixty days; and that the Warden had power to declare the lease void, and to put the complainant in possession of the ground (o). Some doubt was, however, expressed in this decision, owing to proceedings before the Warden being commenced before the lease was executed by the defendant. It was decided in a later case that if a person is in possession under a lease, the holder of a miner's right is not entitled to register a claim over the land held under lease, notwithstanding the fact that such lease may be void or voidable as between the Crown and the lessee, nor can the holder of a miner's right test the validity of such lease in a complaint before the Warden for possession (p). This ruling followed the decision in a case under the Queensland Mining Act, that neither under the Act nor otherwise had the plaintiff any right to interfere with the possession of the lessee (q).

*Bk. II. Ch. III.
Sec. II.*

Possession
under void lease.

The Amending Statute of 1872 (r), passed since the decision in *Wissing v. Finnegan*, makes it unlawful to mark out as a claim any land the subject of an application for lease, and no such marking out will confer any right or title to such land, but is regarded as a trespass on the land applied for (s) within the meaning of section 65 of the Act No. 1120.

(o) *Wissing v. Finnegan*, 3 V.R. (M.) 16; 3 A.J.R. 126 (1872). Under reg. 28 of 1871 a lease, if not executed within the sixty days, was "deemed void"; under the existing regulations (cl. 32) such a lease "may be declared void" by the Governor-in-Council.

(p) *Cock v. Stawell Amalgamated Scotchman's and Cross Reefs G.M. Co.*, 24 V.L.R. 165; 4 A.L.R. 219; 20 A.L.T. 85 (1898).

(q) *Osborne v. Morgan*, 2 Q.L.J. 113 (1886); 13 App. Cas. 227 (1888).

(r) 36 Vic. No. 446, secs. 3, 4, consolidated in secs. 70, 71 of the Act No. 1120.

(s) *Hutcheson v. Erk*, 3 V.L.R. (M.) 1 (1877); *Constable v. Pigtail Q.M. Co.*, 3 V.L.R. (M.) 7 (1877); and see *ante*, Ch. II, Sec. III, "MARKING FOR A CLAIM PENDING APPLICATION FOR LEASE."

CHAPTER IV.

GOLD MINING ON PRIVATE LAND.

SEC. I.—LICENCES TO MINE FOR GOLD.	SEC. III.—MINING ON PRIVATE LAND IN THE OTHER STATES AND NEW ZEALAND.
SEC. II.—GOLD MINING ON PRIVATE LAND IN VICTORIA.	(a) New South Wales.
(a) Gold Mining Leases.	(b) South Australia.
(b) Gold Mining Claims.	(c) Queensland.
	(d) Western Australia.
	(e) New Zealand.

SECTION I.—LICENCES TO MINE FOR GOLD.

Bk. II. Ch. IV.
Sec. I.
Licence granted
by owner.

THE passing of *The Mining on Private Property Act 1884*, which came into operation on Nov. 25 of that year (a) caused a complete revolution in the law regarding mining on land alienated from the Crown. Previous to that date no means existed by which a miner could enter on freehold land for the purpose of mining without the consent of the freeholder, and consequently large areas of private land were locked up and unworked as mines, and many were not even prospected. It is true in most instances the miner could obtain a licence from the freeholder to enter and mine on his land, but only

(a) 48 Vic. No. 796.

on payment of heavy compensation in the shape of a percentage of the gold obtained. *Bk. II. Ch. IV. Sec. I.*

Numerous attempts were made by successive Parliaments from time to time to pass measures authorising and regulating mining on private land, but without success, it being considered that it was a matter not so much of public interest as of private enterprise, until the Act 48 Vic. No. 796 (b), imperfect as it was in many respects, formed the beginning of a new legislation. Legislation as to private land.

It has always been held in Victoria that gold whether on Crown land or on private property belongs to the Crown. "By the law of England, which is also the law of this country, all gold mines belong to the Crown, and though the Crown may have granted the lands containing them to a subject without reservation, the gold under the grantee's land is not his, and neither he nor any one else has a right as against the Crown to take it" (c). For a Crown grant does not pass to the grantee royal mines (*i.e.* gold and silver) that may be found under the land mentioned in the grant unless the intention that such minerals should pass is expressly stated in the grant in apt and precise words (d). Gold mines the property of the Crown.
Effect of grant.

In New South Wales it has been decided in like manner that the legal title and legal ownership of gold are in the Crown (e); and also in New Zealand that auriferous deposits belong to the Crown, subject to the goldfields law of the colony (f); though in a Queensland case, over-ruling *Plant v. Attorney-General* (g), which followed the Victorian decisions, it was held that a grant in fee from the Crown New South Wales.
New Zealand.
Queensland.

(b) *The Mining on Private Property Act* 1884.

(c) *Per Molesworth, J., in Millar v. Wildish*, 2 W. & W. (E.) 37 (1863); and see *Aladdin G.M. Co. v. Aladdin & Try Again G.M. Co.*, 6 W.W. & A'B. (E.) 266 (1869). The issue of a Crown grant, freed from any limitation, operates to prevent the Crown granting a licence to mine on the land granted; *Chambers v. Bushy*, 16 N.Z.L.R.

287 (1897).

(d) *Woolley v. Ironstone Hill Lead Co.*, 1 V.L.R. (E.) 237 (1875), affirmed on appeal to P.C. *sub. nom. Woolley v. Attorney-General*, L.R. 2 App. Cas. 163 (1867).

(e) *Reg. v. Wilson*, 12 N.S.W. S.C.R. (L.) 258 (1874); and see Act 37 Vic. No. 13 (N.S.W.), sec. 5.

(f) *Borton v. Howe*, 3 N.Z.C.A. 5; 2 N.Z.J.R. 97 (1875).

(g) 5 Q.L.J. 57 (1893).

*Bk. II. Ch. IV.
Sec. 1.*

confers upon the grantee possession of a royal mine lying under the land, and that an action is maintainable at his suit against a trespasser working the mine without licence or authority from the Crown (*h*).

Mining with
tacit consent of
the Crown.

But though gold mines on private land in Victoria belong to the Crown, the Government for a long time permitted owners and those bargaining with them to mine without interruption as to the Crown claiming the real profit of the gold (*i*); and thus it came about that a miner desirous of mining on private land disregarded the rights of the Crown, and with the tacit consent of the Crown entered into an agreement with the landowner, who granted a licence authorising mining on his land subject to payment of either rent or a percentage of the gold obtained, or more frequently of both.

Rights of owner
respected.

Though such an agreement and licence were in a manner illegal the rights of the landowner were, however, respected, and mining on private land without the consent of or interference by the Crown was held not to be illegal so as to avoid contracts (*j*), though subject at all times to the assertion of its rights by the Crown (*k*).

Encroachment
on private land.

And a landowner mining on his own land for gold was held entitled to restrain others wrongfully carrying on similar works and encroaching on such land (*l*); and persons mining on private land under licence from the owner might restrain mining thereon by the owner or by any other persons claiming under him (*m*).

Right of owner
to surface only.

The owner of freehold land alone and in his own right as

(*h*) *Plant v. Rollston*, 6 Q.L.J. 98 (1894).

(*i*) *Ah Wye v. Locke*, 3 V.R. (E.) 112; 3 A.J.R. 84 (1872).

(*j*) *Bonshaw Freehold G.M. Co. v. Prince of Wales Co.* (2), 5 W.W. & A'B. (E.) 140 (1868).

(*k*) *Clarke v. Pitcher*, 9 V.L.R. (L.) 128; 5 A.L.T. 17 (1883); *Ah Wye v. Locke*, *supra*.

(*l*) *Broadbent v. Marshall*, 2 W. & W. (E.) 115 (1863); *Astley*

United G.M. Co. v. Cosmopolitan G.M. Co., 4 W.W. & A'B. (E.) 96 (1867); *Western Freehold Co. v. Great Western Co.*, 4 W.W. & A'B. (E.) 44 (1867); *Woolley v. Ironstone Hill Lead Co.*, *supra*.

(*m*) *Newington Freehold Co. v. Harris*, 3 W.W. & A'B. (E.) 174 (1866); *Star Freehold Co. v. Erans Freehold Co.*, 4 W.W. & A'B. (E.) 6 (1867).

freeholder could, however, only restrain mining so far as it caused damage to the surface of his land (*n*); though if the Attorney-General were joined as a party to the suit an owner and parties claiming under him might obtain an injunction to restrain trespass and encroachment by mining (*o*), the Attorney-General being the proper person to represent the Crown in all rights and duties to litigate any matter. *Bk. II. Ch. IV. Sec. I.*

Following the many decisions given by the Victorian Courts it is now enacted by the *Mines Act* 1897 (*p*) that all gold and silver, whether on or below the surface of any land in Victoria, whether alienated or unalienated, are and remain the property of the Crown. Act No. 1514.

SECTION II.—GOLD MINING ON PRIVATE LAND IN VICTORIA.

(a) Gold Mining Leases.

The right of the Crown to royal mines having been established, the policy of the Legislature was to virtually convert all alienated land in the colony into Crown land for the purpose only of gold mining thereon, and providing for payment of a reasonable compensation for surface damage, and asserting the right of the Crown to the gold, regardless of the freehold interest held by the owner in the land. Royal mines.
This was in a measure effected by *The Mining on Private Property Act* 1884 (*a*), which was subsequently consolidated in Part II of the *Mines Act* 1890 (*b*). This portion of the latter Act, together with several amending Acts, has in its turn been repealed by the *Mines Act* 1897 (*c*), Part II of Act No. 796.
Act No. 1514.

(*n*) *Millar v. Wildish*, 2 W. & W. (E.) 37 (1863); *Star Freehold Co. v. Inkerman & Durham Co.*, 3 W. & A'B. (E.) 181 (1866); *Astley United G.M. Co. v. Cosmopolitan G. M. Co.*, *supra*; *Att-Gen. v. Scholes*, 5 W.W. & A'B. (E.) 164 (1868).

(*o*) *Lane v. Hammah*, 1 W. & W. (E.) 66 (1861); *Att-Gen. v. Boyd*,

3 V.R. (E.) 192; 3 A.J.R. 18, 99, 130 (1872); *Att-Gen. v. Lansell* (1), 6 V.L.R. (E.) 134; 1 A.L.T. 177 (1880), and (2) 7 V.L.R. (E.) 59; 2 A.L.T. 155 (1881).

(*p*) 61 Vic. No. 1514, sec. 68 (i).

(*a*) 48 Vic. No. 796.

(*b*) 54 Vic. No. 1120, Part II.

(*c*) 61 Vic. No. 1514.

Bk. II. Ch. IV. which has a much wider scope, and which now embraces the
Sec. II. whole of the Statute law relating to mining on private land
 in Victoria.

Power to grant
 leases.

One of the principal features of the new Act is that it gives equal privileges to the holder of a miner's right to take up private land as a claim with a person applying for a mining lease, and that it includes minerals other than gold in the objects of mining. The Governor-in-Council is empowered to grant gold mining leases on private land (*d*) of (a) lands alienated from the Crown before December 29, 1884, (b) lands alienated, licensed, or leased on or subsequent to that date, (c) mallee, wattle, and Agricultural Colleges lands, and (d) land in the mining districts of Sandhurst, Castlemaine, and Ararat, and on which any registered place of worship is situated, at a greater depth than four hundred feet from the surface. This latter applies only to quartz mines, and the lease cannot include land within one hundred feet laterally of any such church except at a greater depth than four hundred feet from the surface. No purchase money is payable, nor is the consent of the owner or trustees necessary (Act No. 1514, sec. 69).

Land exempted
 from mining.

Certain lands are exempted from mining without the consent of the owner, or unless the lease is limited to a greater depth from the surface than the various limits prescribed for different classes of land (sec. 71); and in the case of mines under or within one hundred yards laterally of any private land on which any spring, dam, sheepwash, or woolshed is in *bonâ fide* use or occupation, or on which any dwelling house, outhouse, building, or manufactory is situated, if the authority of the owner is not obtained, the whole of the land must be purchased by the applicant, unless the lease applied for is limited to a greater depth than four hundred feet from the surface (sec. 71 (6)). Thus, in an

When land must
 be purchased.

(*d*) What is private land is defined by No. 1514, sec. 67. Throughout Section II of the present chapter the several sections quoted

refer to the Act No. 1514, unless otherwise stated as applying to other Acts.

application for a lease of private land on which is a dam in *bonâ fide* use and a dwelling house, and the owner objects to the lease being granted, an injunction will be granted to restrain the applicant from proceeding further with his application until the requirements of section 71 (6) with regard to purchase of the land have been complied with by him, notwithstanding that the Governor-in-Council may have determined to grant the lease (e). Where leases are applied for below the prescribed depths without the consent of the owner, compensation is payable to the owner; but such a lease will only be granted on the conditions set out in section 72.

*Ek. II. Ch. IV.
Sec. II.*

Private land may be taken possession of for mining purposes by any holder of a miner's right, or by an applicant for a lease in accordance with the leasing regulations. In applying for a lease the land must be marked out by the applicant under the regulations, and the applicant may at all reasonable times and doing no unnecessary damage enter on the land for the purpose of marking; and for the purpose of such marking out private land is deemed Crown land (sec. 73 (1), (2)); though an applicant for a lease has no right to enter on certain specified land for the purpose of marking out without the consent of the owner (sec. 73 (4)), and in order to enable an applicant to enter on land alienated from the Crown before December 29, 1884, it is necessary for him to obtain the written authority of the Warden, mining registrar, or a justice of the peace (sec. 73 (6)). A mining surveyor acting under the authority of the Minister may at any time enter upon the land for the purpose of surveying, fixing posts, and boundary marks without liability for trespass, and without payment of compensation (sec. 111).

Marking out.

Entry.

The application for a lease of private land is made under the same leasing regulations as control mining leases of Crown lands (sec. 81), which fully describe the preliminary

Application for lease.

(e) *Thiessen v. Lambert and another*, 6 A.L.R. 113 (1900).

Bk. II. Ch. IV. Sec. II. requirements both for applications and objections (*f*). The pendency of an application for lease begins with the marking out, and continues until the Governor-in-Council grants or refuses the same (sec. 99 (1)), though such pendency will cease under certain conditions specified in section 99 (2), (3). Under the Act No. 1514, sec. 71, an application to restrain an applicant from further proceeding with his application where he had paid fees to the Crown in respect thereof, and other fees would become due if he were allowed to proceed, it is necessary for the plaintiff to join as a party to the proceedings some one as representing the Crown (*g*). A land owner is not entitled in an action for such an injunction to damages in respect of expenses incurred in consequence of the application having been made, if such application were made *bonâ fide* (*h*).

Pendency of application.

Restraining applicant.

Term and rent.

The term of a lease must not exceed fifteen years, and the rent payable to the Crown varies according to the class of land included in the lease, being fixed by section 84; but in no case can it be less than ten shillings per annum (sec. 86).

Compensation by agreement.

It is within the power of the applicant for a lease and the owner (*i*) or occupier of the land to agree as to the amount of compensation to be paid or made to the owner and occupier by the person who desires to mine on the land, or for the purchase money for the land proposed to be taken; and this agreement, if made, must be in writing and signed by the parties (sec. 75). It must be in triplicate, one original part thereof being forwarded to the Minister, and the compensation must be paid or tendered before the lease will be issued (sec. 78 (B)). The compensation for surface damage is payable to the owner or owner and occupier (sec. 76 (3)).

Determined by Warden.

The measure of compensation for surface damage, severance, and consequential damage with regard to gold-mining leases is defined by section 76, and where no agreement is

(*f*) Regulations relating to mining leases, Oct. 8, 1897; and see *ante*, Bk. II, Chap. II, "APPLICATION FOR GOLD MINING LEASES."

(*g*) *Thiessen v. Lambert*, 25 V.L.R.

368; 6 A.L.R. 47 (1899).

(*h*) *Thiessen v. Lambert and another*, 6 A.L.R. 113 (1900).

(*i*) "Owner" is defined by sec. 67.

made between the parties the matter is to be determined by the Warden. For this purpose, if within twenty-one days after marking out the land for a claim, or within ten days after completion of the survey for a lease, no agreement is come to as to compensation or purchase money, then either party may bring a complaint before the Warden to assess compensation, who has jurisdiction to determine the amount payable (sec. 77 (1)). In a case under the Act No. 1120, sec. 327 (re-enacted No. 1514, sec. 71 (6)) it was held that the Warden should include in his assessment of purchase money the value of dwelling-houses, out-offices, mining shafts and fixed mining machinery. The value of the shafts should be assessed on the basis of what the difference would be between the value of the land at the time of the application without the shafts, and the value at the same time with the shafts, taking into consideration the condition of the shafts at the time; and that the Warden had no jurisdiction to consider the title to the purchase money assessed (*j*).

*Bk. II. Ch. IV.
Sec. II.*

Basis of
assessment.

Every such complaint is deemed a proceeding before the Warden within section 219 of the Act No. 1120, and the procedure is similar to an ordinary summons under that section (sec. 77 (3)). In assessing the compensation in accordance with section 76 allowance is to be made by the Warden for compensation already received by the owner or owner and occupier in respect of the same land (sec. 77 (2)). Thus, under the present Act as under the former Act, the Warden acts in a judicial capacity, and not merely as *persona designata* for assessment of compensation, and his decision is appealable (*k*). In the event of either party failing to appear on the hearing of the summons, the Warden should assess the compensation upon the evidence submitted by the other party (*l*).

Complaint
before Warden.

(*j*) *Moule v. Luke*, 23 V.L.R. 470; 18 A.L.T. 158; 4 A.L.R. 12 (1897).

(*k*) See *Re Frederick the Great Tribute Co.*, 13 V.L.R. 373; 8 A.L.T. 174 (1887), decided under Act No. 796. Appeal from the de-

cision of the Warden is now authorised by Act No. 1514, sec. 77 (3).

(*l*) See *The Trustees, Executors, and Agency Co. and The Mining on Private Property Act 1884*, 11 V. L.R. 717 (1885).

Bk. II. Ch. IV.
Sec. II.

Right to enter.

The holding of a miner's right or the granting of a lease confers no right to enter on the land for the purpose of mining unless the compensation money has been paid or tendered to the owner, or an agreement in writing has been executed, and the payment, tender, or agreement certified on the lease (sec. 74); and before the Minister will permit a lease to be issued he must be satisfied of the same facts (sec. 78). In case the owner is dead or cannot be found, the payment is to be made to the Minister in trust for him or his representatives (sec. 74).

Payment before entry.

Death of applicant.

A lease applied for by an applicant who dies before it is issued may be granted and issued in his name, and be executed by his representatives, and devolves in the same manner as if it had been executed prior to the death of the applicant (sec. 112).

Abandonment of application.

An applicant may at any time abandon his application for a lease marked out by him (sec. 77 (5)): and may with the approval of the Minister and in accordance with the regulations transfer his interest in such application (sec. 112); and a mining lease may with the consent of the Governor-in-Council be surrendered at any time (sec. 88).

Transfer.

Surrender.

Renewal.

All mining leases carry with them the right of renewal, for which the lessee must apply before the expiration of the term of his lease (sec. 97 (1)), subject to payment of compensation; and a transferee of the whole or part is equally entitled to renewal (sec. 97 (2)). The pendency of an application for renewal begins with the receipt of the application by the Minister, and continues until it is granted or refused. A lease, the renewal of which is applied for, continues in force during the pendency of the application for renewal, and during such pendency the owner of the land has no power to agree with the holders of miners' rights to mine thereon (sec. 100), neither can the land, or any part of it, be marked out as a claim; any such marking is a trespass, damages for which may be recovered before the

Application for.

Warden (sec. 98).

All Crown grants, leases, and licences under the *Land Act* contain a condition permitting mining on or under the land granted leased or licensed on payment of compensation for damage to the surface, and the holder of a miner's right or a gold-mining lease is authorised to enter for the purpose of mining, the Warden determining the claim for compensation, subject to the right of appeal to the Court of Mines (*m*); and the determination of the Warden pursuant to Act No. 1514 of the amount of compensation is deemed a sufficient compliance with such condition (sec. 80).

Every gold-mining lease contains a condition of avoidance of the lease for non-fulfilment of the labour covenant (sec. 83). In the event of a breach of this covenant by the lessee any holder of a miner's right may apply to the Minister for an enquiry in the manner prescribed by section 101, and on proof of such breach the lease may be declared void, and a lease of the land granted to the applicant. The procedure is the same, *mutatis mutandis*, as an application for an enquiry on breach of the labour covenant with regard to leases of Crown lands (*n*).

The Warden has power to order inspection by a mining surveyor, or by some experienced miner, of any land held as a claim or lease of private land, in order to ascertain whether the holders are encroaching upon any street or road (sec. 103), or upon any land not comprised in such claim or lease (sec. 104), and may grant an injunction against trespass or encroachment on such land (sec. 107); and disobedience of the Warden's order may be dealt with under section 249 of the Act 1120, which renders the person who disobeys such order liable to a penalty not exceeding fifty pounds, to be recovered in a summary way before any court of petty sessions. The powers thus given to the Warden are in many respects similar to the powers vested in him with regard to mines on Crown lands (*o*).

(*m*) 54 Vic. No. 1106, secs. 65-68, 118-121.

(*n*) Act No. 1514, Part I, Sub. 4. See *ante* Ch. III, "FORFEITURE OF

GOLD MINING LEASES."

(*o*) See Act No. 1120, sec. 244, *et seq.*; and see *ante* Bk. I, Ch. IV, Sec. III, "INJUNCTION."

*Bk. II. Ch. IV.
Sec. 11.
The Land Act
1890.*

Labour
covenant.

Inspection.

Injunction
restraining
encroachment.

*Bk. II, Ch. IV,
Sec. II.*

Injunction by
Supreme Court
or Court of
Mines.

An injunction may also be granted by the Supreme Court or the Court of Mines to restrain trespass or encroachment, at the suit of the Attorney-General, or of the owner, or of any other person in lawful possession of the land, without proof of any special or material damage (sec. 102); and generally the jurisdiction conferred on the Warden and the Court of Mines by the Act No. 1120, Part I, Div. 2, with respect to mining on Crown lands applies to any private land comprised in a lease or a claim (sec. 96).

Injunction
against owner.

Under the Mining on Private Lands Acts of New South Wales (57 Vic. No. 32 and 60 Vic. No. 40) it was held by the Privy Council, affirming the decision of the Supreme Court, that a person who has complied with the provisions of *The Mining on Private Lands Act 1894*, and lodged a valid application for a lease, has such an interest in the land applied for as to entitle him to an injunction to restrain the owner from trespassing thereon (*p*).

Tributer.

A lease declared void, or a claim declared forfeited, is subject to all existing rights of a tributer or sub-tributer (*q*), and in the event of a new lease of the land being granted, the tribute agreement is to be continued by the new lessee (sec. 120). No tribute can be let of any mine, nor any interest therein assigned, without the consent of the Minister (sec. 121).

Additional
surface area.

A leaseholder or claimholder may at any time by giving twenty-one days' notice in writing to the owner or owner and occupier of the land acquire an additional surface area on payment of compensation, or may agree upon the amount of compensation or purchase money to be paid, as upon an original application for lease (sec. 79).

Rights of
owner.

A landowner may himself apply for a lease of his land, if not previously applied for, and his application has priority (sec. 93); and he also has a right by authority of the

(*p*) *Zobel v. Croudace* (2), 20 N.S.W.L.R. (L.), 28 (1899).

(*q*) Defined by Act No. 1514, sec.

67; see *ante* Bk. II, Ch. I, Sec. III, "TRIBUTE AGREEMENTS."

Governor-in-Council, of re-entry on land belonging to him and comprised in a lease if it is not properly worked, notwithstanding the lease may not have expired (sec. 94). In case of damage to or depreciation of land or buildings thereon adjoining or in the vicinity of a claim or lease of private land, the owner of such land or buildings is entitled to compensation (sec. 122).

*Bk. II. Ch. IV.
Sec. II.*

An applicant for a lease desirous of testing the land may in his application apply for a prospecting area, not to exceed five acres for quartz mining or ten acres for alluvial mining, within the area of the land applied for, and a licence may be granted to him for the purpose, on payment of compensation to be assessed under the Act (sec. 95).

Prospecting area.

(b) Gold Mining Claims.

Any private land (except as before mentioned as exempted) may be taken up as a claim by the holder of a miner's right, whose powers and liabilities as to marking out, and assessment and payment of compensation, are similar to those of an applicant for a lease. The claim must be marked out, registered, and worked in accordance with the by-laws of the district in which it is situated (sec. 73), and is subject to the *Mines Acts* and the by-laws in the same manner as if it were Crown lands held as a claim (sec. 89).

Claims on private land.

Subject to by-laws.

Compensation for surface damage payable by a claimholder is determined, as in the case of application for a lease, by agreement with the owner and occupier, or failing such agreement being made within twenty-one days after the marking out, by complaint before the Warden at the suit of either party (sec. 77); and in case an agreement is made with the owner and occupier, the claimholder must file a copy of it with the mining registrar at the time when he makes application to register his claim (sec. 90). The jurisdiction of the Warden to assess compensation with respect

Compensation.

Jurisdiction of Warden.

Bk. II, Ch. IV. to leases applies also to claims (sec. 77), as does also his
Sec. II. jurisdiction to restrain encroachment (sec. 102, *et seq.*).

Marking out
 leased land.

The marking out as a claim of any part of the land included in an application for lease, or for renewal of a lease, during the pendency of such application, is a trespass within the jurisdiction of the Warden, and confers no right or title to the land marked out (sec. 98): and the holder of a miner's right is not allowed to make any agreement with the owner for mining on such land during the pendency of the application for lease (sec. 99 (4)), nor during the pendency of an application for renewal of lease (sec. 100).

Conformity
 with by-laws.

As private land taken up under the Act as a claim by the holder of a miner's right thereupon becomes virtually Crown land for the purpose of mining thereon, and as the claim acquired must be marked out, registered, and worked in accordance with the by-laws, the law relating to interests in gold mining claims on Crown lands as set forth in Book I, *ante*, will apply to all claims on private land.

Application for
 lease by claim-
 holder.

Section 68 of the Act No. 1120 applies to private land (sec. 46); and the interest of a claimholder in his claim is in nowise affected by an application by him for a lease of the ground, or by the refusal or abandonment of such application; if the lease be granted the miner's right title will merge in the interest held under the lease.

SECTION III.—MINING ON PRIVATE LAND IN THE OTHER STATES AND NEW ZEALAND.

Legislation as
 to mining on
 private land.

The Statute law of mining for gold on private land in Australia, being of an entirely novel character, of necessity originated and has been established without precedent, and in consequence any legislation on the subject must be to a large extent experimental; and from this cause arises the lack of uniformity which is noticeable in the Acts of the

various States relating to this class of mining. "It is only to be expected," says Darley, C.J., in speaking of the Mining on Private Lands Acts of New South Wales (*a*), "that Parliament and Parliamentary draughtsmen should have experienced some difficulty in clearly expressing what was the intention of an Act of so novel a description, and in which rights of so novel a character are created" (*b*). It is therefore to be taken as a consequence that in some of the sections of the Acts the wording is not altogether clear in the expression of their meaning, a defect which is common to all the Acts dealing with mining on private land, and which can only be remedied by amendment from time to time as occasion may arise.

*Bk. II. Ch. IV.
Sec. III.*

There is no Statute law in the State of Tasmania authorising gold mining on private land; indeed, any person who mines on private land in that State without the consent of the owner is liable to a severe penalty (*c*). In New South Wales (*d*), South Australia (*e*), and Western Australia (*f*) separate Acts are in force relating to this class of mining; while the law in Queensland (*g*) and New Zealand (*h*), as in Victoria, is included in the several consolidated mining Acts.

Tasmania.

Other States.

(*a*) New South Wales.

Mining on private land in New South Wales is authorised and regulated by the Act 57 Vic. No. 32 (*i*) and the amending Act 60 Vic. No. 40.

Mining Acts.

Under the Act 57 Vic. No. 32 any private land, with the exception of town and village land (sec. 4), and land reserved for public purposes (sec. 5), may be leased for gold

Leases of private land.

(*a*) *Zobel v. Croudace* (1), 18 N.S.W.L.R. (L.) 312; 14 W.N. 100 (1897).

(*b*) Referring to 57 Vic. No. 32 (N.S.W.), and 60 Vic. No. 40 (N.S.W.).

(*c*) 57 Vic. No. 24 (Tas.), sec. 178.

(*d*) 57 Vic. No. 32 (N.S.W.); 60 Vic. No. 40 (N.S.W.).

(*e*) 51 & 52 Vic. No. 448 (S.A.); 58 & 59 Vic. No. 626 (S.A.).

(*f*) 62 Vic. No. 29 (W.A.); 63 Vic. No. 31 (W.A.).

(*g*) 62 Vic. No. 24 (Q.), Part VII.

(*h*) 62 Vic. No. 38 (N.Z.).

(*i*) *The Mining on Private Lands Act of 1894.*

*Bk. II. Ch. IV.
Sec. III.*

mining purposes by any applicant who is the holder of a miner's right or a mineral licence (sec. 28), with the right to occupy for all purposes connected with mining (sec. 11), provided the leased land does not extend to within one hundred yards of any land *bonâ fide* used as a garden or orchard, or within two hundred yards of any land on which is erected the principal residence of the owner, or on which is any valuable improvement, in which cases the consent of the owner is necessary (sec. 11); and unless with such consent, no lease can be granted of land under cultivation (sec. 12), except under the conditions of section 5 of the amending Act (*j*).

Entry to
examine
surface.

The Warden has power to grant to any holder of a miner's right an authority to enter upon any private land to examine the surface thereof (sec. 8) on certain terms prescribed by the amending Act (60 Vic. No. 40, sec. 2), but he has no right to commence mining on it until compensation has been paid.

Compensation.

Compensation for damage through entry and mining is to be assessed by one of the mining appraisers appointed by the Governor, unless an agreement be come to between the owner and the miner for payment of compensation by way of percentage of gold or otherwise (sec. 16). In the event of either party being dissatisfied with the assessment of the appraiser he may appeal to the Minister to have the assessment reviewed, in which case it is referred to the Warden to determine the amount of compensation, and his decision is final (sec. 17). If the award so made be not paid within the time specified by the Act, the application for lease becomes void, and all fees and moneys paid by the applicant are forfeited to the Crown (sec. 18). Any further damage accruing during the progress of mining operations is assessed in a similar manner (sec. 20), and compensation may also be claimed by any owner of adjoining land for damage done to his property (sec. 21).

If not paid.

A landowner may apply for a lease of his own land, and his application has priority (sec. 25) over other applications; and the preliminary proceedings on his application may be dispensed with.

*Bk. II. Ch. IV.
Sec. III.*
Lease to owner.

Provisions dealing with encroachment on streets or private land, authority to enter and inspect &c., are in most respects similar to the provisions of the Victorian Act (sec. 29) (*k*).

Encroachment.

Under Part III of the Act No. 32 the Warden may grant to the holder of a miner's right a prospecting licence to enter on any private land which is subject to the operation of the Act. Whenever alluvial deposits containing payable gold are discovered, the land may be resumed by the Crown for mining purposes, subject to the payment of compensation to the owner and occupier for the loss of their interest; and on revocation of the resumption the former owner has a preferent right to re-purchase the land (sec. 40). Before granting any such prospecting licence the Warden may require a deposit to be paid by the applicant to cover surface damage, and on resumption of the land by the Crown the prospector has a preferent right to a claim; and in the event of a quartz reef being discovered on the land, he has a preferent right to a lease (sec. 42). The provisions relating to resumption of land are enlarged by the amending Act (60 Vic. No. 40), and provision is thereby made for assessing the compensation payable to the owner for market value of the land and improvements, together with allowance for severance.

Prospecting licence.

Resumption of land.

The owner of private land may enter into an agreement with the holder of a miner's right to occupy any portion of it as a claim, subject to the regulations of the mining board, and such claim must be registered with the mining registrar (*l*); and the owner may also, with the consent of the Minister, enter into a lease with the holder of a miner's

Owner may agree with miner.

(*k*) See Act No. 1514, Part II, Sub. 2.

(*l*) 57 Vic. No. 32 (N.S.W.), sec. 33.

Bk. II. Ch. IV. right, and give him power to take possession of the land for
Sec. III. mining purposes (*m*).

(*b*) **South Australia.**

How right to
mine acquired.

By *The Mining on Private Property Act* of South Australia (*n*) the right to mine on private land may be acquired by (1) resumption of private land by the Crown (Part I); (2) the proclamation of private land as an alluvial goldfield (Part II); and (3) compulsory mining lease (Part III).

Resumption of
land.

Any private land (*i.e.* land not being Crown land) may be provisionally resumed by the Crown with the consent of the owner, or upon written application therefor (sec. 6); and this provisional resumption may be made absolute, whereupon the land becomes Crown land (sec. 8) upon payment of the purchase money therefor (sec. 9); and immediately upon the absolute resumption taking effect the land is available for mining purposes as Crown land. The regulations relating to the resumption of land are contained in the schedule to the Act.

Purchase on
resumption.

During provisional resumption, which is limited to a term of six months, compensation assessed by the Commissioner of Crown Lands is payable in respect of mining operations (sec. 11), and on a provisional resumption being made absolute the land is purchased by the Crown, and the purchase money and compensation are assessed under the powers of compulsory purchase contained in the *Land Clauses Consolidation Act* (sec. 9).

Proclamation of
alluvial gold-
field.

Private land may under similar conditions be proclaimed an alluvial goldfield (sec. 17), when all laws and regulations in force relating to alluvial gold mining apply to such land, and the land is subject to the jurisdiction of the Warden as Crown land (sec. 17). All claims taken up on such land must be registered with the Warden (*o*).

(*m*) 60 Vic. No. 40 (N.S.W.),
sec. 11.

(*o*) 58 & 59 Vic. No. 626 (S.A.),
sec. 9.

(*n*) 51 & 52 Vic. No. 448 (S.A.)

Any person may apply to the owner of private land to grant him a mining lease of it (*p*), and if he refuse to do so the land may be taken compulsorily, unless the owner be mining on it himself (sec. 22); the lease is granted subject to certain conditions set forth in section 23.

*Bk. II. Ch. IV.
Sec. III.*
Compulsory
lease.

An owner and applicant may agree between themselves upon the terms of the lease, but failing such agreement the owner may be compelled to grant the lease at a royalty of two and a half per centum of the gross money value of metal raised (sec. 23 (ii)), and a rent for surface area to be assessed by the Local Court of Full Jurisdiction (sec. 23 (iii)).

Royalty.

(c) Queensland.

The law of mining on alienated lands in Queensland (*q*) is based to a considerable extent on Part II of the *Mines Act* 1890 of Victoria (*r*).

Queensland
Mining Act.

Subject to the payment of compensation or otherwise as prescribed by the regulations, any holder of a miner's right may with the written sanction of the Warden enter on alienated ground to search for gold (62 Vic. No. 24 (Q.), sec. 59 (1)); claims may be taken up and registered for working under the land in the same manner as if such land were unoccupied Crown land (sec. 59 (2)); or a lease may be granted under Part IV, relating to leases of Crown land (sec. 59 (3)); and in either case no marking off is required if the surface lying above the mines to be worked is in actual occupation. Notice of the application as prescribed must be given (sec. 59 (4)), and the owner and occupier may be heard in objection.

Claim or lease
may be taken

The holder of a claim or lease is entitled to work underground at a depth of not less than seventy feet from the surface, and to occupy any part of the surface authorised by the Warden (sec. 59 (5)). The surface area required by

Limitation of
rights.

Surface area.

(*p*) 51 & 52 Vic. No. 448 (S.A.),
sec. 21.

secs. 58-70.

(*q*) 62 Vic. No. 24 (Q.), Part VII,

(*r*) Act No. 1120, Part II, now
repealed by No. 1514.

*Bk. II. Ch. IV.
Sec. III.*

the applicant must be described in the application for a claim, or be specified in a lease, as well as the boundaries of the entire claim or lease (sec. 59 (6)); and any mining operations carried on at a depth less than seventy feet from the surface, except by permission of the Warden, is a trespass and encroachment on the surface owner (sec. 59 (7)).

Inspection.

An extension of surface area may be obtained at any time (sec. 59 (8)); and any landowner may obtain from the Warden an authority to inspect the underground workings beneath his land (sec. 59 (9)).

Compensation.

Compensation for damage likely to be done to the surface is assessed by the Warden before mining operations are begun, and the applicant must deposit with the Warden the amount of probable damage so assessed before he is entitled to mine on the land. If any damage is done, compensation for it is paid out of this deposit, otherwise the deposit is returned to the miner when he leaves the land (sec. 60). In case either party is aggrieved by the assessment of the Warden, he may proceed to have the compensation settled by arbitration (sec. 61).

Surrender of
freehold estate.

An owner of land in fee simple is entitled to surrender his estate to the Crown, and obtain a fresh Crown grant of his land, which is then subject to the provisions of the Act (sec. 63), and if he does so he has priority in applying for a gold mining lease (sec. 64); but any person who has previously obtained from the owner a licence to mine on the land takes priority over all other applicants, including the owner; and a lease may be granted to such person on such conditions for the benefit of the owner as the Governor may deem equitable (sec. 65).

Royalty.

Royalty at the rate of one shilling per ounce is payable to the Crown in respect of all gold raised from the land (sec. 66), and provision is made for enforcing payment of such royalty (sec. 69), for inspection of books and accounts (sec. 68), and for furnishing returns of the yield of gold (sec. 67).

(d) Western Australia.

The Legislature of Western Australia has practically adopted in its *Mining on Private Property Act* 1898 (s) the statute law in force in Victoria relating to mining on private land, by re-enacting the whole of Part II of the Victorian Act No. 1514, with a few alterations and additions rendered necessary to suit local conditions; so that the law relating to mining on private land in Western Australia may be regarded as uniform in all respects with that in force in Victoria. A short Act passed in 1899 (t) makes several amendments, principally verbal, which are not material to a discussion of the general scope of the law. The reader is therefore referred to Section II of the present Chapter, *ante*, dealing with the law of mining on private land as established in Victoria, which is applicable to and almost identical with that in Western Australia.

*Bk. II. Ch. IV.
Sec. III.*
Adoption of
Victorian law.

All land the subject of gold-mining leases issued under *The Sluicing and Dredging for Gold Act* 1899 (u) is for the purpose of gold mining in any lode, reef or vein deemed private land within the meaning of the Act 62 Vic. No. 29 (W.A.) (v).

Leases for
sluicing and
dredging.

(e) New Zealand.

Under *The Mining Act* 1898 of New Zealand (w) all alienated lands, including lands alienated from Native owners are open for prospecting for gold, and are also liable to be resumed by the Crown for mining purposes, subject to the consent of the owners and occupiers being obtained if the land be not comprised within the limits of a mining district (sec. 50).

Land open for
prospecting.

The resumption of land for mining purposes is deemed to be a taking of the land for a public work within the meaning of *The Public Works Act* 1894 (sec. 51). Any person may make application to the Minister for the resumption of

Resumption of
land.

(s) 62 Vic. No. 29 (W.A.).

(t) 63 Vic. No. 31 (W.A.).

(u) 63 Vic. No. 43 (W.A.).

(v) See Act No. 1514, sec. 73 (4).

(w) 62 Vic. No. 38 (N.Z.).

Bk. II. Ch. IV. land, and must deposit with his application the sum of £25
Sec. III. (sec. 52), which is applied towards payment of costs payable by the applicant (sec. 52 (4)). The application is referred to the Warden (sec. 52 (1)), who enquires into the matter and reports thereon to the Minister (sec. 52 (2)); and the Minister has absolute discretion to determine whether or not the land shall be resumed.

Land exempt
 from
 resumption.

Except with the consent of the owner and occupier certain lands are exempt from resumption, including land used as a garden, orchard, &c. (sec. 53 (1)), land within a town or borough of less area than a quarter of an acre (sec. 53 (2)), land within one hundred feet of any house, church, public building, &c. (sec. 53 (3)), land which is being *bonâ fide* mined on by authority of the owner or occupier (sec. 53 (4)), or land which is being prospected (sec. 53 (5)).

Compensation.

All claims for compensation against the Crown for resumption of land are to be assessed under Part VII of the Act (sec. 55), in the manner provided by Part III of *The Public Works Act 1894* (sec. 232). If the claim is not settled by agreement, it is to be heard and determined by a judge of the Supreme Court in cases where it exceeds £250, and in other cases by the magistrate having jurisdiction in the locality (sec. 233). Claims for compensation payable otherwise than by the Crown are, failing agreement between the parties, determined by the Warden and two assessors (x).

Procedure.

The procedure on a claim against the Crown for compensation is prescribed by section *234 of the Act 62 Vic. No. 38, and the compensation when assessed is payable out of moneys appropriated for the purpose (sec. 237). Compensation is not payable except in cases for which it is expressly provided by the Act (sec. 238), nor in respect of the auriferous value of the land, except in cases where the owner or occupier may be entitled by law as against the Crown to the deposits of gold in the land (sec. 239).

(x) Regulations under the Act No. 38, June 18, 1900, cl. 86.

The owner of land, or any person with his consent, may apply for and obtain from the Warden a licence for any mining privilege with respect to it, as if it were Crown land, and while such licence is in force the land cannot be prospected, or mined on by others, or resumed (sec. 56). The Minister may also, in lieu of resuming land, agree with the owner that such land shall be available for mining as Crown land (sec. 57). In either of the latter cases no compensation is payable, but the owner is entitled to all rents, royalties, and licence fees derived from mining on the land (sec. 58).

*Bk. II. Ch. IV.
Sec. III.*
Agreement with
owner.

Special provision is also made (sec. 59) for mining on land acquired by the Crown from Native owners, and subject to any estate or interest created therein prior to such acquisition, by reason of which the land is not Crown land open for mining (*y*).

(*y*) As to agreements made between native owners and the Crown prior to the issue of a Crown grant, see *Aitken v. Swindley*, 15 N.Z.L.R.

(S.C.) 517 (1897), following *Wi Parata v. Bishop of Wellington*, 3 N.Z.J.R. (N.S.) S.C. 72.

BOOK III.

MINING INTERESTS OTHER THAN CLAIMS AND LEASES.

CHAPTER I.

MINING PARTNERSHIPS OTHER THAN INCORPORATED COMPANIES.

Bk. III. Ch. I.
Co-operative
mining
companies.

FROM the earliest days of the diggings in Victoria it has been customary for two or more men to band themselves together as mates for the purpose of gold seeking, or in other words to form a partnership for mining purposes by verbal agreement. This practice is frequently carried out at the present day, or where considerable outlay is anticipated it is customary for a larger number of miners to form themselves into a partnership by means of a partnership agreement or deed of association, without registration under *The Companies Act*, Part II. These partnerships are usually

known as co-operative companies, and it is with these and similar partnerships that we have to deal in discussing the law affecting mining partnerships. Bk. III. Ch. I.

As to what suffices to constitute a miner a partner with another or others the principle of the ordinary laws of partnership applies, and need not be discussed here. One partner or mate cannot sue his mates or co-partners at law (a), neither can one partner in a claim sell or dispose of more than his own share in it (b); and a shareholder in a co-operative company cannot be sued for calls, as the money if recovered would be partnership property (c). What will constitute partnership.

A joint adventure, such as an agreement to carry on a mine for a definite period and for a special object, is not necessarily a partnership, and the fact that gold obtained during that period was to be placed to the joint account of the parties will not *per se* constitute a partnership (d); co-owners in mining properties are not *ipso facto* either partners or co-trustees one for the other, although under special circumstances such relations may arise (e). Under the Goldfields Act of 1866 of New South Wales (f) the amalgamation of several claims (reg. 14) was held not to constitute a partnership in respect of such claims; it only enabled separate owners to work together and mingle their produce (g); and in New Zealand it was held that an agreement that the object of the venture should be to extract gold within the limits of a claim, and after payment of expenses to divide the profits among the claimholders, constituted them partners with respect only to the gold, but not joint tenants with respect to the claim (h); for partnership in the profits gained by mining for gold must be kept distinct from partnership in the land (i). And where in a Joint adventure.

(a) *Meehan v Oliver*, Sp. Ct. Vic. (E.), March 27, 1865; *Argus*, March 29, 1865.

(b) *Miller v. Rigby*, 2 V.R. (M.) 32; 2 A.J.R. 134 (1871).

(c) *Gordon v. Gibbons*, 12 N.S.W. S.C.R. (L.) 40 (1873).

(d) *Collins v. Locke*, 5 V.L.R. (L.) 13 (1879).

(e) *Little v. McDonald*, 1 Q.L.J. 124 (1883).

(f) 30 Vic. No. 8 (N.S.W.).

(g) *Ex parte McInnes*, 9 N.S.W. S.C.R. (L.) 28 (1870).

(h) *Gallagher v. Talty*, 7 N.Z. L.R. 35 (1888).

(i) *Sunki v. Simpson*, Hore Dig. (Tas.) 87 (1888).

Bk. III. Ch. I. joint adventure, not being a partnership, one party advances money necessary to carry it on, he may at law recover from the other party his share of the amount (*j*).

Agreement to admit partner.

An agreement in respect to admitting a partner in a claim, part of which is freehold, must be in writing, the matter being an interest in land within the meaning of the Statute of Frauds (*k*).

General partners.

A mate or partner in a claim is not necessarily a partner in all transactions, and unless otherwise agreed between them the partnership will comprise only the claim worked by them in conjunction (*l*). Thus, where P was a sleeping partner with M who worked the claim, during which work M discovered a new reef, and took up and registered himself for a claim on the new reef, it was held that P the sleeping partner in the old claim had no interest in the new claim, which had nothing to do with the partnership (*m*).

Undivided share in claim.

An undivided share in a claim under section 77 of the Act No. 32 was held to mean a share with others to work the claim for the common purpose of dividing the proceeds as partners. It is often absolutely necessary that the claim should be worked by all the partners, and if it were not worked by the whole it could not be worked at all. It was for the Warden to determine in effect whether a partnership existed, and if he so determined he could put a partner in possession of his individual share in such claim (*n*).

Working on terms.

Working on terms of receiving a sum fortnightly to be deducted from dividends will not of itself constitute a partnership, the stipulation being for a share of dividends and not of income (*o*).

(*j*) *Collins v. Locke*, 5 V.L.R. (L.) 13 (1879).

(*k*) *Meyenberg v. Pattison*, 3 Q.L.J. 184 (1889).

(*l*) As to mining partnerships in New Zealand, see 62 Vic. No. 38 (N.Z.), Part VIII.

(*m*) *Perry v. Morton, Argus*, Nov. 26, 1868.

(*n*) *Kin Sing v. Won Paw*, 1 W. & W. (L.) 303 (1862); compare Act No. 1120, sec. 135 (vii), 216.

(*o*) *United Hand in Hand and Band of Hope Co. v. National Bank of Australasia*, 2 V.L.R. (E.) 206 (1876); *Meldrum v. Atkinson*, 5 V.L.R. (E.) 154 (1879).

The *Instruments Act* 1890, section 212, provides that no action shall be brought whereby to charge any member of a partnership or co-adventure established or to be established for mining purposes and not registered under *The Mining Companies Limited Liability Act* 1864 (*p*), upon any simple contract made by or with any other member of such partnership or co-adventure on behalf of the same, unless such contract, or some memorandum or note thereof, shall be made or contained by or in some writing to be signed by the defendant in such action (*q*). Bk. III. Ch. I.
Act No. 1103,
sec. 212.

The object of this clause is to protect a partner from an action by a stranger with whom another of the partners has contracted on behalf of the partnership, unless the partner defendant has assented to the contract in writing. As to various dealings by partnerships, and payments made to persons without, it has never been held that the dealing not being binding, or the payment enforceable, under the Statute of Frauds, would exempt one partner from liability to contribute to the partner making the payment. Therefore, notwithstanding the section quoted, partners for mining purposes not registered as a company are, as to adjusting accounts between themselves, liable for expenditure incurred by other partners with sufficient authority from them, though there may be no written evidence of that authority (*r*); but a member of an unincorporated company is not liable upon a contract made by a manager or agent of the company to whose appointment he did not assent, and to whom he did not give authority in writing. Such a manager is agent only for those who appointed him, or authorised him to contract on their behalf; the defendant's positive assent must be proved (*s*). Object of the
clause.

Where miners holding a claim in partnership form themselves into an incorporated company and one partner is Partners
registering
as a company.

(*p*) 27 Vic. No. 228.

(*q*) See *Ex parte Kitchingman and Milton*, 6 A.L.T. 246 (1885). This section will apply to any unregistered company, notwithstand-

ing the repeal of the Act No. 228.

(*r*) *Allardyce v. Cunningham*, 5 A.J.R. 162 (1874).

(*s*) *Renwick v. Barkas*, 2 V.L.R. (L.) 269 (1876).

Bk. III. Ch. I. excluded, the partner so excluded cannot sue the company to be declared entitled to shares in the company as representing his share in the claim. He must sue his co-partners for having appropriated his property as theirs in the amalgamation (*t*); and if some of a number of partners form themselves into a company to register it, excluding some of the partners, the new registered company does not represent the persons originally registered for the claim, and therefore cannot sue for encroachment (*u*).

Remedy of
creditors.

The registration of a partnership as a corporation will not affect the remedies which creditors possessed as against the partnership before such registration (*v*); and it seems when a company is illegally registered under the *Companies Act* it remains an ordinary mining partnership, and the law of partnership as distinguished from that of mining companies will apply (*w*).

Trustees for
company.

But where three partners, who were lessees from the Crown, floated and registered a company to work leased ground, but after registration of the company failed to transfer the lease, it was held that they were merely trustees and must transfer the lease to the company (*x*).

Effect of
exclusion from
company.

A partner, however, who has been excluded from an unregistered company cannot maintain a suit against his co-partners, seeking to be entitled to his share in the ground, unless he holds a miner's right in force at the time the cause of suit arose (*y*). But such an exclusion will not operate as a dissolution of the partnership as regards the excluded partner, and if several partners refuse to acknowledge another as a partner, where no time is specified for the continuance of the partnership, that will not necessarily

(*t*) *Parle v. Harp of Erin Amalgamated Quartz and Crushing Co.*, 3 W.W. & A'B. (E.) 98 (1866).

(*u*) *Warrior G.M. Co. v. Cotter*, 3 W.W. & A'B. (M.) 81 (1866).

(*v*) *Irving v. Minerva G.M. Co.*, 3 W.W. & A'B. (L.) 78 (1866).

(*w*) *Robertson v. Wealth of Na-*

tions G.M. Co., 14 V.L.R. 584; 10 A.L.T. 29 (1888).

(*x*) *Randall v. Mau*, 2 V.R. (E.) 158; 2 A.J.R. 103 (1871).

(*y*) *Mackeprang v. Watson*, 2 W.W. & A'B. (L.) 106 (1865); *Jones v. Abraham*, 2 W. & W. (L.) 158 (1863). See Act No. 1120, sec. 298.

dissolve the partnership and exclude the partner whom the others have refused to acknowledge (z). *Bk. III. Ch. I.*

A mining partnership may be dissolved according to the law regulating ordinary partnerships, but where an Act (a) provided that every partnership should be dissolved by the death or bankruptcy of any partner, it was held that this did not apply to mining partnerships (b). Dissolution of partnership.

Where a partner abandoned his share and allowed his rights to lie dormant for nine years after resigning his share he was held to be debarred by his negligence from asserting any right to such share (c); though it is otherwise where there is no negligence or carelessness. Thus, in *May, 1858, K*, a partner with others in a claim, attended a meeting of the partners, and declined to contribute towards sinking a shaft which his partners proposed to sink. He did not pay into the mine, and his partners continued working it. K offered to surrender his share to the other partners if they would give him a release from all liabilities in respect of the partnership, but the other partners declined to do this. Two years afterwards, in 1860, the mine became valuable and K claimed his share; the other partners resisted on the ground that he had forfeited or abandoned his share. It was held that K had not been guilty of such *laches* as would reasonably lead his partners to suppose that he had abandoned his share, and that he was entitled to his interest in the ground (d). Abandonment of share.

A partner, however, who absents himself from the partnership claim, but without the intention of abandonment, cannot be deprived of his share by the remaining partners merely obtaining an order for possession from the Warden. One partner cannot jump another partner's share; a partner Absenting without abandoning.

(z) *Kin Sing v. Won Paw*, 1 W. & W. (L.) 303 (1862).

(a) *New Zealand Partnership Act* 1891, sec. 36; see *Victorian Act* 55 Vic. No. 1222, sec. 37 (i).

(b) *Stewart v. Nelson*, 15 N.Z.L.R. S.C. 637 (1895); see 62 Vic. No. 38 (N.Z.), sec. 249.

(c) *Cohn v. Heine*, Sp. Ct. Vic. (E.), Oct. 31, 1867; *Argus*, Nov. 1, 1867.

(d) *Heine v. Klein*, Sp. Ct. Vic., March 21, 1861; *Argus*, March 22, 1861. As to shares in a company, see *Bryant v. Saunders*, 2 V.L.R. (E.) 224 (1876).

CHAPTER II.

WATER RIGHTS AND PRIVILEGES.

Bk. III. Ch. II.

Water rights
conferred by
miner's right.

IN mining parlance the term water-right may be held to include the privilege conferred by the Act No. 1120, Part I, on the holder of a miner's right of cutting, constructing and using races, tail races, dams and reservoirs for gold-mining purposes through and upon any Crown lands, and of taking and diverting water from any spring, lake, pool or stream situate or flowing through or adjoining any Crown lands, and to use such water for mining for gold, or for his domestic use (*a*).

Easement.

A water-right is analogous to an easement (*b*), and is a "gold-mining purpose" within section 5 of the Act No. 1120. "In Victoria, where the subject has often been considered, it has always been held that the making of a race is a 'mining purpose' within the meaning of the Acts from which all our (New Zealand) Mining Acts are more or less borrowed" (*c*).

(*a*) Act No. 1120, secs. 5, 64; the latter section, relating to licences to construct races &c., is extended to private land; Act No. 1514, sec. 44.

(*b*) *Chin Fan v. Davis*, 11 N.Z.

L.R. 396 (1892).

(*c*) *Per Chapman, J.*, in *Robinson v. Blundell, Mac.* (N.Z.) 683 (1867); and see as to water-rights in New Zealand, 62 Vic. No. 38 (N.Z.), secs. 91 *et seq.*

The means by which water-rights may be acquired and held are defined by the by-laws made under the Act No. 1120, sec. 106 (iv), which by-laws also provide for the events in which such water-rights are liable to become forfeited, relinquished or abandoned (sec. 106 (vii), (ix), (x)), and for their assignment (sec. 106 (xii)).

Bk. III. Ch. II.
How acquired.

In addition to the water privileges granted by section 5 of the Act No. 1120 to the holder of a miner's right, the Governor-in-Council may also grant to any person for any term not exceeding fifteen years a licence authorising him to cut, construct and use races, drains, dams and reservoirs through or upon any Crown lands (*d*) or private land (*e*), whether such land shall or shall not be held under miner's right or mining lease, and to take or divert water from any spring, lake, pool or stream, in order to supply water for the purpose of gold-mining, and the right conferred by such licence is deemed a chattel interest (*f*).

Licence of water-right.

The grant of a claim as a dredging claim (*g*) carries with it the right to use the water of a river intersecting it for dredging, if it is the only practicable way of working the claim, and does not interfere with private rights. In such a case the Warden can refuse the application of another person to take and use the water running in the intersecting river, both on the ground that it is against the legal rights of the holder of the dredging claim, and also on the wider ground of its being against public interest and good administration (*h*).

Dredging claim.

A right to divert water (*i*) is not a right to erect a dam and thereby raise the level of the water in a river (*j*); but

Erecting dam.

(*d*) Act No. 1120, sec. 64.

(*e*) Act No. 1514, sec. 44.

(*f*) As to grant of water-rights in the other States, see 37 Vic. No. 13 (N.S.W.), sec. 15 (2); 62 Vic. No. 24 (Q.), sec. 15 (2), (3); 56 & 57 Vic. No. 587 (S.A.), sec. 33 (1); 57 Vic. No. 24 (Tas.), Part IV, sec. 49, and 63 Vic. No. 39 (Tas.), sec. 4; 56 Vic. No. 40 (W.A.), sec. 32; 62 Vic. No. 38 (N.Z.), secs. 91 *et*

seq.

(*g*) See 62 Vic. No. 38 (N.Z.), sec. 76 (3); and regs., cl. 15, 16.

(*h*) *In re Paterson*, 16 N.Z.L.R. (S.C.) 295 (1898).

(*i*) See 62 Vic. No. 38 (N.Z.), sec. 92.

(*j*) *Ah Mon v. Bradfield*, 1 N.Z.J.R. (N.S.) M.L. 44 (1872); and see *Borton v. Howe*, 3 N.Z.C.A. 5; 2 N.Z.J.R. 97 (1875).

Bk. III. Ch. II. a mere watercourse (Nelson Goldfield Regulations (N.Z.), cl. 18) is not a river (*k*). And the erection of a dam across a running stream by a riparian owner is not lawful if it obstruct for one moment the flow of the entire stream so as to injuriously affect the rights of riparian proprietors below him (*l*). The right to recover damages for improper interference with a watercourse depends upon the question whether in fact the plaintiff's lawful and reasonable enjoyment of the water has been sensibly affected by the act of the defendant, and this is entirely a question of fact for the jury (*m*). And such right to recover damages is not limited to miners; a mill-owner on a goldfield was held to have a sufficient title to maintain an action for interference with his riparian rights although he did not hold a miner's right or a business licence (*n*).

Regulations.

The licence under section 64 of the Act No. 1120 to cut and construct races, dams, and reservoirs and to divert water for mining purposes is granted under regulations made in pursuance of the Act (*o*), which regulations define the meaning of the words race, drain, dam and reservoir. The conditions under which the licence is granted are embodied in the licence, which may be revoked by the Governor-in-Council at any time on payment of compensation. The owner of a licence may recover in a summary way before a justice any money due in respect of water supplied by him.

Effect of water-right licence.

A water-right licence merely gives to the licensee such rights and privileges as are specified therein, viz. a water easement. It gives him permission to take and use water, not exceeding a specified quantity, from certain defined sources of supply, with the right to cut a race for the conveyance of that water through certain specified lands, and with the right to a reasonable use of the land specified in the licence for the purposes of a water race, and so far as

(*k*) *Costello v. O'Donnell*, 1 N.Z. L.R.C.A. 105 (1882).

(*l*) *Pring v. Marina*, 5 N.S.W. S.C.R. (L.) 390 (1866).

(*m*) *Dunn v. Collins*, 1 S.A.L.R. 126 (1867).

(*n*) *Gilmour v. Butel*, 1 N.Z.J.R. (N.S.) M.L. 23 (1873).

(*o*) "Regulations relating to licences to cut, construct and use races, drains and reservoirs," Oct. 30, 1893.

necessary therefor (*p*). In New Zealand, also, the rights of a grantee of a water-race on the goldfields are analogous to easements, and the extinguishment of such rights in whole or in part are to be determined on the same principles which apply to the extinguishment of easements (*q*); and thus, under a former Queensland Act (*r*) a leaseholder was held to be entitled to mine under the surface of land occupied and registered as a water-right area (*s*).

The grant of a water-right carries with it the obligation on the grantee of constructing the race in so skilful and efficient a manner that no overflow or percolation should escape on his neighbour's land; where the land subsides it is a question of fact whether the fall is due to the inefficiency of the race or to the too close working of the soil by the owner of the adjacent land (*t*).

At common law every man may stop and use and appropriate all rain water, as distinguished from streams, flowing over his land, and may erect dams on his land to retain the water, but he cannot complain of a stranger interrupting the water above him (*u*). But this stopping and using of rain water would not be considered as a water-right, as would be the case were the water diverted from a stream. The owner of land bounded by a stream or river is not, as between himself and others lower down the stream, warranted in diverting water so as to sensibly diminish the volume of water in the stream or river (*v*).

And it seems that the holder of a creek claim, with a race and a creek right in connection therewith, under the by-laws (*w*) would not have priority over a licence granted

(*p*) *Allen v. Pund* (Court of Mines), 20 A.L.T. 44 (1898).

(*q*) *Chin Fan v. Davis*, 11 N.Z. L.R. 396 (1892).

(*r*) Queensland Mining Act, 38 Vic. No. 11.

(*s*) *Hall v. Gorrie*, 3 Q.L.J. 113 (1888); see 62 Vic. No. 24 (Q.), sec. 12.

(*t*) *North Brothers Home Co. v. Triangle Co.*, Hore Dig. (Tas.) 36 (1884).

(*u*) *Stevens v. Webster*, 3 W.W. & A'B. (M.) 23 (1866); see *Lyons v. Winter*, 6 A.L.R. 122 (1900).

(*v*) *Nightingale v. Daly*, 3 W.W. & A'B. (M.) 7 (1866). As to surface and storm water, and loss of water in a natural stream by underground percolation, see *McNamara v. Minister for Works*, 15 N.S.W. L.R. (E.) 173 (1894).

(*w*) Beechworth By-laws, No. XXIV, cl. 6.

Obligation in constructing water-race.

Right to rain water.

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(*w*) Beechworth By-laws, No. XXIV, cl. 6.

Bk. III. Ch. II. under the Act 25 Vic. No. 148, sec. 11 (*x*), and would not be entitled to deprive the holder of such licence of any portion of the quantity of the water specified in such licence when the natural supply is insufficient for both; though *quare* whether a licensee can stop the water of a stream to the extent prescribed in his licence as against a person having a legal right to water in the part of the stream through which its water is diverted (*y*). So, in New Zealand, in the event of application by two parties for a licence to draw water for mining purposes from a creek, and in the event of there not being sufficient water to satisfy both parties, the first occupier has the superior right (*z*).

Insufficient supply of water.

Injury by owner of water-right.

It is incumbent on persons using a stream so to use it as not to injure others. Thus, in an action for throwing sludge on plaintiff's land, whereby it was injured, defendants pleaded that as holders of miners' rights mining on Crown lands they used a stream flowing through those lands, which afterwards flowed through plaintiff's land, for washing auriferous earth and for their mining operations, and as an outlet for the water so used, in consequence of which the stream was discoloured, which was the grievance complained of; but it was held on demurrer that the plea was bad (*a*), as it was incumbent on the defendants to do the acts complained of in such manner as not to injure the plaintiff. But a riparian owner has a right to the ordinary use of water flowing past his land, and may make a sluice, so long as he does not pollute the stream or interfere with the rights of other riparian owners either above or below him (*b*).

The holder of a miner's right is entitled to occupy Crown lands for a dam for domestic purposes, though not actually

Dam for domestic purposes.

(*x*) This section is re-enacted in the Act No. 1120, sec. 64.

(*y*) *Nightingale v. Daly*, 3 W.W. & A.B. (M.) 7 (1866).

(*z*) *St. Bathans Channel Co. v. Watson*, 5 N.Z.L.R. S.C. 184 (1886).

(*a*) *Campbell v. Ah Cheong*, 1 V.R. (L.) 25; 1 A.J.R. 35; N.C. 68 (1875).

(*b*) *Derry T.M. Co. v. Garibaldi T.M. Co.*, Hore Dig. (Tas.), 36 (1889). As to the right of claim-holders for compensation for damage by the construction of a tail-race passing through the boundaries of their race, see *Bohning v. Carroll*, 1 N.Z.J.R. (N.S.) M.L. 47 (1874).

engaged in mining; no distinction can be drawn between being the holder of a miner's right and being actually engaged in mining (*c*); and the holder of a water-race under the by-laws, who has complied with the by-laws, and who is the holder of a miner's right and resides on a goldfield, is entitled under the Act No. 1120, Part I, to hold a residence area (*d*).

Bk. III. Ch. II.

But the holder of a dam was not entitled under the Act No. 32 to claim the ownership of a watershed over the area of Crown lands from which the water would naturally flow to his dam, which right he could only get from the Crown by express grant; the Act only protected him in the ownership of the dam itself, and against all direct injuries to it; it enabled him to do on Crown lands what he could on his own, with the same consequential rights (*e*). Where on a complaint for disturbing a water-race the defendant relied on a Crown grant of the land, and complainant on his miner's right, it was held that a *bonâ fide* question of title was involved which ousted the jurisdiction of the justices (*f*). In New Zealand the owner and occupier of land situated in a mining district may sue in the Supreme Court for damage to riparian rights; the jurisdiction of the Warden is not exclusive (*g*).

Right to watershed.

Jurisdiction of justices.

New Zealand.

The Court of Mines and the Warden have jurisdiction (*h*) to hear and determine a complaint by the holder of a water-right licence for trespass, or unlawful interference with or injury to his right, whether wilful or by negligence, and for diversion or abstraction of water from his source of supply (*i*);

Jurisdiction of Court of Mines and of Warden.

(*c*) *McLean v. Wearn*, 1 A.J.R. 152 (1870).

(*d*) *Campbell v. McIntyre*, Ch. Ct. of Mines, Sept. 2, 1869; *Argus*, Sept. 3, 1869; and see *post*, Ch. IV, Sec. II, "RESIDENCE AREAS."

(*e*) *Stevens v. Webster*, 3 W.W. & A'B. (M.) 23 (1866); compare Act No. 1120, secs. 5, 64.

(*f*) *Reg. v. Webster*, 1 V.R. (L.) 82; 1 A.J.R. 78 (1870).

(*g*) *Dunn v. Frost*, 18 N.Z.L.R. (S.C.) 182 (1899).

(*h*) Act No. 1120, secs. 135 (iii), (vi), (x), 216. As to duty of

Warden and assessors on a proceeding as to right to divert water &c., see sec. 238.

(*i*) *Trahair v. Rocky Mountains Sluicing Co.*, 11 V.L.R. 281 (1885); *Doane v. Fairbairne* (*Argus*, Sept. 11, 1865) distinguished, in which case it was held that under the Act No. 32, sec. 70 the Warden had not jurisdiction to restrain a diversion of water with rights under the subsequent Act 25 Vic. No. 148; see Act No. 1120, sec. 64, which reenacts section 11 of the above Act.

Bk. III. Ch. II. but in a complaint for interfering with and trespassing on a right to use and divert water for mining purposes, by abstracting and diverting the same, the Warden cannot go into the question of prospective injury to the complainant's rights from the defendant's acts, or injury to any right which the complainant might have to the surface of the land, or of trespass to the land occupied by complainant's race (*j*). The Warden has jurisdiction to decree forfeiture of a water-right (*k*), and an original licence obtained by misrepresentation may be cancelled by the Warden (*l*) although it has been several times renewed (*m*); and the holder of a miner's right (*n*) is entitled to institute proceedings before the Warden for the recovery of water-rights alleged to have been forfeited (*o*). Neglect or delay in constructing a water-race does not entail forfeiture, so long as the water-right is used for mining purposes (*p*); but work done for other than mining purposes will not count as work done in connection with water-rights so as to avoid a forfeiture (*q*).

Forfeiture.

Assignment of licence.

A licensee under section 64 of the Act No. 1120 may assign his licence, and by the regulations (*r*) it is provided that any person to whom a licence is issued may transfer it, provided he shall give notice of such transfer to the Minister of Mines. An application for the consent of the Minister is not a condition precedent to the transfer, as the regulations only require notice to be given to him after the transfer is complete and accepted (*s*). An equitable mortgage of a water-right (*t*) may be created without registration of any lien or transfer (*u*); and the holder of a water-right may also surrender or renew his licence (*v*).

(*j*) *Hyndman v. Micke*, 8 V.L.R. (M.) 39; 4 A.L.T. 84 (1882).

(*k*) Act No. 1120, sec. 216.

(*l*) Under New Zealand Act 30 Vic. No. 32.

(*m*) *Reg. v. Keddlle*, 1 N.Z.L.R. S.C. 185 (1885).

(*n*) Under the Gippsland By-laws.

(*o*) *Coates v. South Loch Fyne G.M. Co.* (1), 25 V.L.R. 51; 21 A.L.T. 223; 5 A.L.R. 276 (1899).

(*p*) *Frater v. Howe*, 1 N.Z.J.R.

(N.S.) M.L. 30 (1873).

(*q*) *Davis v. Robertson*, 1 N.Z.J.R. (N.S.) M.L. 36 (1873).

(*r*) Regulations relating to licences to cut races &c., *supra*.

(*s*) *Baw Baw Sluicing Co. v. Nicholls*, 9 V.L.R. (L.) 208; 5 A.L.T. 73 (1883).

(*t*) 59 Vic. No. 40 (W.A.), sec. 13.

(*u*) *Hargan v. Western Australian Bank*, 1 W.A.L.R. 107 (1899).

(*v*) Act No. 1514, sec. 45.

A water-race which runs through private land (in New Zealand) when abandoned merges in the freehold, discharged from all rights of user for mining purposes, and any person desiring to use it as a water-race must take the same steps to acquire it as if he were about to cut a new race (*w*).

Bk. III. Ch. II.
Water race on private land.

The law relating to abandonment and forfeiture of claims and wrongful interference therewith (*x*) applies to water-rights in Victoria (*y*).

Law as to forfeiture &c.

The Crown may also grant to any person not being an elective body corporate (*z*), subject to the provisions of the Act and to the regulations, a lease of any water reservoir constructed at the expense of the public (*a*), and may also grant such lease to an elective body corporate on such terms and for such rent and subject to such covenants and conditions as the Governor-in-Council may specially determine (*b*); and on the granting of such lease any sum of money due in respect of water supplied from such reservoir may be recovered in a summary way before a justice (*c*).

Leases of reservoirs.

(*w*) *Reg. v. Keddell*, 1 N.Z.L.R. S.C. (1882).

(*x*) *Ante* Bk. I, Ch. IV, V.

(*y*) Act No. 1120, sec. 135 (i).

(*z*) See Act No. 1120, sec. 50, as to meaning of "elective body corporate."

(*a*) Act No. 1120, Part I (6), secs. 59-62.

(*b*) See "Order in Council regulating the granting of leases of public water reservoirs," Oct. 29, 1866.

(*c*) Act No. 1120, sec. 60.

CHAPTER III.

DUTIES AND OBLIGATIONS OF MINE-OWNERS.

SEC. I.—REGULATION AND INSPECTION
OF MINES.

SEC. II.—DRAINAGE OF MINES.

SEC. III.—MUNICIPAL ASSESSMENTS.

SEC. IV.—NUISANCES.

SECTION I.—REGULATION AND INSPECTION OF MINES.

Bk. III. Ch. III.
Sec. I.

Rules for
management of
mines.

By the Act No. 1514 (*a*) general rules are promulgated for the management of mines and mining works (*b*), and any mine manager or any person in charge of the works and operations who contravenes or fails to comply with such rules is guilty of an offence against the Act, unless he prove that he had taken all reasonable means to prevent such contravention or non-compliance (*c*); and merely reporting want of appliances to the directors of a company was held not to be taking such reasonable means for prevention (*d*). Where under Act No. 1120, section 357 (1), a general rule required that an adequate amount of ventilation should be

(*a*) 61 Vic. No. 1514, Part III, Div. 1.

(*b*) Rules of a similar nature are in force in the other States. See 56 & 57 Vic. No. 587 (S.A.), Part IV; 59 Vic. No. 40 (W.A.); 62 Vic. No. 24 (Q.), Part XIII, Div. 1, sec. 193; Regulations under 37 Vic.

No. 13 (N.S.W.), July 16, 1889; 57 Vic. No. 24 (Tas.), Part VI, sec. 88; 62 Vic. No. 38 (N.Z.), Part V, sec. 183.

(*c*) Act No. 1514, sec. 136.

(*d*) *Stewart v. Berryman*, 9 V. L.R. (L.) 116; 5 A.L.J. 19 (1883).

produced in every mine, it was held to be a question for the jury to decide whether a mine-owner had taken all steps reasonably practicable to produce an adequate amount of ventilation (*e*). Bk. III. Ch. III.
Sec. 1.

The owner of a mine includes an incorporated company (*f*), and in case of an unincorporated company the person having the management of the mining operations (*g*). Definition of
mine-owner.

Under a repealed Act (*h*) a mine-owner was held liable for contravention even though the miner injured may have been negligent, unless the non-compliance with the provisions of the Act were attributable entirely to the miner; where the accident was not caused by non-observance of the provisions of the Act the common law was held to apply, except that the owner was by the Act expressly made answerable for the acts of a fellow-servant of the injured miner, and contributory negligence on the part of such miner was held to be a good defence (*i*). Manager or
person in charge
of works.

What is a mine is defined by the Act (*j*); a mine includes a level wherein or whereby any operation is carried on for or in connection with the purpose of obtaining any metal or mineral (*k*). Definition of
mine.

The doctrine that a master is not responsible to one servant for injuries resulting from the negligence of another servant has been abrogated as regards mining accidents, and an action under the Act No. 480 (now repealed) was held to be sufficiently sustained by proof of the happening of the accident unless the defendant could show how it happened, and that it was the result of some *vis major* for which no one was to blame, or that it was the result solely Negligence of
fellow-servant.

(*e*) *Cowie v. Berry Consols Extended G.M. Co.*, 24 V.L.R. 319; 4 A.L.R. 259 (1898). See Act No. 1514, sec. 135 (1).

(*f*) Act No. 1514, sec. 128.

(*g*) *Curthoys v. Kilbride*, 2 V.L.R. (L.) 265 (1876). See Act No. 1514, sec. 136.

(*h*) 37 Vic. No. 480; see Act No. 1514, sec. 148 (1).

(*i*) *Lauverson v. Count Bismarck*

G.M. Co., 4 V.L.R. (L.) 83 (1878); compare Act No. 1514, sec. 148.

(*j*) Act No. 1514, sec. 128.

(*k*) *Cowie v. Berry Consols Extended G.M. Co.*, 24 V.L.R. 319; 4 A.L.R. 259 (1898). As to meaning of "mine" under the *Police Offences Act 1890* (54 Vic. No. 1126, sec. 41 (xi)), see *Uren v. Rosewarne*, 15 A.L.T. 36 (1894).

Bk. III. Ch. III. Sec. 1. of the injured miner's neglect of the provisions of the Act (*l*).

The burden of proof that a workman has been selected with due care lies on the party asserting the fact, but if in the opinion of the jury there was evidence that such workman was competent, that itself would be some evidence that he had been duly selected (*m*).

Definition of drive.

Under section 2 of the before-mentioned Act No. 480 a drive which had been worked out and left unused was not deemed to be a drive or part of a mine (*n*); but in the existing Act special words are inserted to include a worked out or unused part of a mine (*o*).

Protection to drives and excavations.

By sub-section viii of section 5 of the Act No. 480, which is re-enacted in section 135 (11) of the Act No. 1514, a drive or any excavation in connection with the working of a mine must be securely protected and made safe for persons employed therein, and this is not confined to injuries occurring in the drive or excavation which is not securely protected, but to persons working in the mine (*p*); and a platform (*q*) was held to mean something attached to the ladder or side of the shaft (*r*).

Platform.

Contributory negligence.

Where a miner was injured by a piece of timber intended to keep the lift or pump tube secure in the shaft, which had fallen from its position, and the miner admitted that he had known of its being loose for nine months previously, and had not given information of the fact to the manager or anyone else in authority, it was held under the Act No. 583, sec. 12 (*s*) that the plaintiff had not been guilty of contributory negligence in not reporting as dangerous what had existed so long without occasioning injury (*t*).

Shaft signals.

Providing a means of communication from the top to the

(*l*) *Kaye v. Ironstone Hill Lead G.M. Co.*, 2 V.L.R. (L.) 148 (1876). Compare Act No. 480, sec. 8 with Act No. 1514, sec. 148; and see *Wrongs Act* 1890 (54 Vic. No. 1160).

(*m*) *O'Driscoll v. North Duke Co.*, 17 A.L.T. 64; 1 A.L.R. 94 (1895).

(*n*) *Laurenson v. Count Bismarck G.M. Co.*, 4 V.L.R. (L.) 83 (1878).

(*o*) Act No. 1514, sec. 128.

(*p*) *Gibson v. Chalk*, 3 V.L.R. (L.) 15 (1877).

(*q*) Act No. 1514, sec. 135 (42).

(*r*) *Campbell v. Parker's Extended Q.M. Co.*, 10 V.L.R. (M.) 1 (1884).

(*s*) Act No. 1514, sec. 152.

(*t*) *Eureka Extended Co. v. Allen*, 9 V.L.R. (L.) 341 (1883).

bottom of a shaft, or signalling by certain knocks with a hammer upon the centres of the top of the shaft, which was understood by the miners and proved effective (*u*), was held to be a sufficient compliance with the Act (*v*).

*Bk. III. Ch. III.
Sec. I.*

The Act No. 1514, sec. 130, requires that miners shall not be employed below ground for more than forty-eight hours in any week, nor more than eight hours in any day, except in cases of emergency; but where miners are allowed half an hour for refreshment during their shift, which time is entirely at their own disposal, their employer is not liable to a penalty for keeping them eight hours and a half below ground; he only employs them for eight hours, and during the half-hour they were not at the order of their employer, who during that time had no control over them (*w*).

Time of
employing
miners
underground.

Under a New Zealand Act (*x*) a tributer was held not to be a person employed in a mine (*y*). The words "employed in or about a mine" include the period during which a miner who was working there is lawfully going to and coming from his work at proper times (*z*).

Person
employed in a
mine.

Section 135 (30) of the Act No. 1514 as to persons in charge of machinery applies only in the case of machinery in connection with the working of a mine, and does not apply to the mere erection of machinery (*a*).

Erection of
machinery.

In proceeding before the Warden to recover compensation for injuries sustained by complainant while working in defendant's mine (*b*) the summons should allege which provision of the Act has been contravened or not complied with, or it will be bad for vagueness, though it may be amended (*c*). Proceedings for damages may also be taken in the County Court or the Supreme Court (*d*).

Proceedings
before the
Warden.

(*u*) Act No. 1514, sec. 135 (14).

(*v*) *Stewart v. Berryman*, 9 V.L.R. (L.) 116; 5 A.L.T. 19 (1883).

(*w*) *Granger v. St. Mungo G.M. Co.*, 12 V.L.R. 5; 7 A.L.T. 107 (1886).

(*x*) 50 Vic. No. 51 (N.Z.), sec. 217.

(*y*) *Hoskings v. Caledonian G.M. Co.*, 7 N.Z.L.R. 756 (1889); see Act

No. 1514, sec. 132.

(*z*) *O'Driscoll v. North Duke Co.*, 17 A.L.T. 64; 1 A.L.R. 94 (1895).

(*a*) *Dunstan v. Stewart*, 6 V.L.R. (L.) 175 (1880).

(*b*) Act No. 1514, sec. 148 (2).

(*c*) *Campbell v. Parker's Extended Q.M. Co.*, 10 V.L.R. (M.) 1 (1884).

(*d*) Act No. 1514, sec. 140.

Bk. III. Ch. III.
Sec. I.

Inspectors of
mines.

With the view of enforcing compliance with the provisions of the Act the appointment of inspectors of mines is authorised (*e*), whose duty it is to inspect any mine or mining machinery for the purpose of ascertaining whether the provisions of the Act are being complied with, and the owner of the mine or machinery is required to render all facilities for the purpose of such inspection; and notice of any accident occurring in a mine must be given to the local inspector within twenty-four hours after the occurrence of the accident, and the portion of the mine where the accident occurred must not be interfered with until it has been inspected (*f*).

Notice of
accident.

Mine manager.

Every mine is required to have a mine manager, whose name and address must be registered with the inspector, and a mine in which more than twelve men are employed may not be worked for more than fourteen days without such manager (*g*).

Engine drivers.

Engine drivers employed in connection with a mine are required to hold a certificate of competency obtained from a board of examiners for engine drivers (*h*), and an unqualified person taking charge of machinery is guilty of an offence against the Act (*i*); and any holder of a certificate may be disqualified (*j*). The board of examiners may also grant a licence authorising an engineer to inspect boilers, and give certificates as to their condition (*k*), who when licensed will take the place of an inspector under the general rules in section 135.

SECTION II.—DRAINAGE OF MINES.

Natural
drainage by
deepest mine.

Where a number of mines are being worked along the course of a continuous reef or lode, the mine which contains

(*e*) Act No. 1514, sec. 149.

(*f*) *Ibid*, sec. 153.

(*g*) *Ibid*, sec. 139.

(*h*) *Ibid*, sec. 142.

(*i*) *Ibid*, sec. 143.

(*j*) *Ibid*, sec. 144.

(*k*) *Ibid*, sec. 145.

the deepest workings will naturally receive the drainage waters from other portions of the reef or lode beyond the boundaries of such mine ; and it would be manifestly unjust that one mine-owner should be burdened with the expense of draining the adjoining mines without receiving some compensation for so doing. Bk. III. Ch. III.
Sec. II.

This difficulty was experienced in the earliest times of working deep mines, and several Acts were passed from time to time dealing with the subject. *The Quartz Drainage Act (a)*, regulating the drainage of mines on quartz reefs, proved to be inefficient, for in a case under that Act, where a person obtained a decree before the Warden against a company holding a gold-mining lease from the Crown, for money due as contribution for draining their claim, a rule was made absolute prohibiting further proceedings, but without costs, on the ground that the Act applied only to claims, and that a gold mining lease was not a claim (b). Legislative provisions regulating drainage.

This Act was repealed by *The Mining Statute 1865*, which empowered the mining boards to make by-laws for enforcing and regulating the drainage of quartz reefs and claims (c), but the numerous complicated by-laws made in pursuance of this Act proved very cumbrous, and the sub-sections xiv and xv of section 71, and all by-laws made under them, were repealed by the present *Drainage of Mines Act 1877 (d)*. By-laws regulating drainage.

Under this Act owners of pumping machinery may require contribution from mine-owners whose mines are drained by such machinery, and contribution under the Act may be recovered from the owner of a mine on the same line of reef, although the machinery used for drainage purposes is also used for the general working of the mine (e). Drainage of mines.

(a) 25 Vic. No. 153.

(b) *In re Clow, ex parte Hewitt*, 2 W. & W. (L.) 160 (1863).

(c) Act No. 291, sec. 71 (xiv), (xv).

(d) 41 Vic. No. 596 ; re-enacted in Act No. 1120, Part III, Div. 2,

and amended by the Act No. 1514, sec. 157. Analogous Acts are in force in other States ; 56 & 57 Vic. No. 587 (S.A.), sec. 82 ; 57 Vic. No. 24 (Tas.), Part VII, sec. 116 ; 62 Vic. No. 24 (Q.), Part XII, sec. 184.
(e) *Wheat Terril Q.M. Co. v.*

Bk. III, Ch. III.
Sec. II.

Proceedings for
contribution
before the
Warden :

In case the parties interested cannot agree as to the payment of drainage dues, the owner of the machinery may proceed against the mine-owners liable for such payment before the Warden, who may make an order on such mine-owners to pay such sums periodically or otherwise to the owner of such machinery as he shall think just and reasonable, and may in making his order impose on the owner of the machinery such terms as shall seem just for the efficient working thereof (*f*). Either party may require the matter to be heard and determined before the Warden and assessors, and the proceedings are to be conducted in conformity with Part I of the Act No. 1120.

or Warden
and assessors.

How amount of
contribution
determined.

In determining which mine-owners shall be liable to contribute towards the expense of drainage, regard must be had to the total length of reef or lode affected by the drainage operations, and to the benefit derived therefrom by such mine-owners (No. 1120, sec. 381) who are entitled to receive credit for the value of any work they may perform in assisting to drain the reef or lode (sec. 382); and no drainage fees are payable during suspension of drainage operations (sec. 380).

Forfeiture for
nonpayment of
drainage dues.

But under a by-law in force prior to the passing of *The Drainage of Mines Act (g)*, containing a provision that a claim should not be liable to forfeiture during any period for which drainage dues were being paid, it was held that the claim was not protected from being declared abandoned by the Warden on an application to be put in possession of such claim, on the ground that the owners of it were liable to pay drainage assessment, whether such payment had been made or not; there should be an actual payment, and not a mere liability to pay (*h*).

How dues
arrived at.

The mode by which drainage dues payable are arrived at is by calculating—

Irwin, 6 V.L.R. (M.) 11; 1 A.L.T.
176 (1880).

(*f*) Act No. 1514, sec. 157.

(*g*) Sandhurst By-law, No. VI,

cl. 39.

(*h*) *Christian v. Kenworthy*, 3 W.
W. & A'B. (M.) 11 (1866).

(A) The interest on the value of machinery and plant used for drainage purposes only ; *Bl. III. Ch. III. Sec. II.*

(B) The wear and tear of such machinery and plant ;

(C) The cost of oil, grease, and packing ;

(D) The proportionate cost of fuel expended, or of horses employed, in drainage operations ;

(E) The wages of engine-drivers, or of other persons, in such proportions as such persons may be deemed to be employed in draining a mine ; and

(F) Such other expenses as the owner of the machinery can prove have necessarily been incurred in respect of the drainage effected by such machinery (*i*).

Contracts may be made, apart from the Act, between mine-owners on one line of reef, for the purpose of draining their mines. And where an owner of machinery covenanted by deed to keep down the water in a mine belonging to an adjoining mine-owner by means of pumping machinery, which the plaintiff was required to keep constantly at work, and he kept his pumps constantly at work during week days, but the machinery was not worked on Sundays, though the water was kept under, this was held to be a sufficient compliance with the contract (*j*). Contracts for drainage.

The procedure before the Warden is regulated by the Act (*k*) and the moneys directed by the Warden's order to be paid become a charge upon the estate of the owner of the mine in respect of which such moneys are directed to be paid (*l*). Procedure.

SECTION III.—MUNICIPAL ASSESSMENTS.

Gold mines have always been exempt from payment of municipal rates. The word "mines" is, however, capable of Definition of "mines."

(*i*) Act No. 1120, sec. 379.

(*k*) Act No. 1120, secs. 383-385.

(*j*) *Stevens v. Craven*, 2 V.R. (L.) 37 ; 2 A.J.R. 35 (1871).

(*l*) *Ibid*, sec. 386.

Bk. III. Ch. III.
Sec. III.

a very wide construction, and many attempts have been made by various municipalities to enforce rates payable, or claimed to be payable, on buildings or appurtenances of mines. Several decisions have, however, been obtained on the question, and the definition of mines within the meaning of the *Local Government Act 1890* (a) is now fairly established. "The word 'mines' includes every fair adjunct to the mine, and the adjuncts are not merely machinery for the purpose of moving the earth to the surface, but also machinery necessary for making it into a marketable state. But it includes nothing beyond that, and certainly not machinery used for crushing ore brought from other mines, or other ore belonging to a stranger" (b).

Land and
buildings
included.

And the word "mines" in *The Local Government Act* also includes any land held or at any future time to be held as a claim under miner's right for mining purposes, or included or to be included in a gold-mining lease, and therefore if a building be part of a mine, and a necessary adjunct to that mine, it will be exempt from payment of rates, no matter for what purpose or use it may be applied (c).

Smithies.

Smithies are not necessary adjuncts to a mine, and are ratable property (d), but a building enclosing an engine and batteries erected by two companies at the intersection of their leases, and extending on to the ground of both companies, half the stamp heads being set apart for each company, is a necessary adjunct to the leased land of both companies, and is therefore exempted from rates (e).

Engine house.

Blacksmith's
shop, office, and
store.

Where, however, the property rated was described in the assessment as "engine and battery of twelve heads, with blacksmith's shop, office, and store," it was held that the battery as a necessary adjunct to the mine was, along with

(a) 54 Vic. No. 1112, sec. 246.

(b) Per Stawell C.J., in *Davidson v. Stawell Road Board*, 1 W.W. & A'B. (L.) 79 (1884).

(c) *Mayor, etc., of Eaglehawk v. Lady Barkly G.M. Co.*, 11 V.L.R.

593; 7 A.L.T. 72 (1885).

(d) *Carlisle Co. v. Mayor, etc., of Sandhurst*, 5 A.J.R. 14 (1874).

(e) *Mayor, etc., of Eaglehawk v. Lady Barkly G.M. Co.*, *supra*.

the mine, exempted from rates, but that the other property as no such necessary adjunct was not exempted, and was liable to be rated (*f*). Bk. III. Ch. III. Sec. III.

If mining property is rated as "works," and not as a mine, the word "works" must be taken, in the absence of anything to the contrary appearing on the face of the rate, to mean only ratable property. "Describing merely as 'works' land on which there are mines, is at the most an insufficient description and insufficiency of description in the rate does not form a valid objection to a demand for payment of such rate" (*g*); and where the whole mine has been rated, in default of an appeal against the assessment, the justices before whom the rate is sought to be enforced cannot reduce it to the amount due on the buildings actually ratable. If the defendant is liable for anything he is liable for all (*h*). When rated as works.

All machinery on the surface of the land used for purposes strictly subservient to the working of the mine should be regarded as part of the mine within the exemption from rates, and if an engine is not an adjunct to the mine on the land, the land is ratable. But all machinery to be exempted must have the character of being used for the purpose of extracting the mineral from the mine or extracting the metal from that mineral; and land held under miner's right, on which was machinery used for the purpose of crushing for the mine and for others not interested in it was held not to be exempted from rates (*i*); nor is land held under lease on which is erected machinery used for crushing for the lessees and for strangers (*j*); nor is land on which is erected a public crushing machine, which is not a mine within the meaning of the Act, but crushing What machinery is exempt.
Crushing for mine and for others;
for lessee and for strangers;
for the public.

(*f*) *Clunes United Co. v. Borough of Clunes*, 2 W.W. & A'B. (L.) 96 (1865).

(*g*) *Per Stawell C.J.*, in *Shire of Bulla v. Allison*, 1 V.R. (L.) 79 (1870).

(*h*) *Carlisle Co. v. Mayor, etc., of*

Sandhurst, 5 A.J.R. 14 (1874).

(*i*) *Davidson v. Stawell Road Board*, 1 W.W. & A'B. (L.) 79 (1864).

(*j*) *Campbell v. Stawell Road Board*, 1 W.W. & A'B. (L.) 79 (1864).

Bk. 111, Ch. 111, Sec. 111. machinery for the public (*k*); nor were mines on private land (*l*).
 Private land.

 SECTION IV.—NUISANCES.

Injury to adjoining claim. A person who uses or exercises control over anything, or who permits the existence of a nuisance, is bound to adopt such measures as will prevent injury to others; and miners on Crown lands are not justified in allowing a nuisance to continue which would injure owners of adjoining claims, or owners of private property (*a*).

Flow of sludge. If, therefore, a company allows sludge to flow on private land, an injunction will be granted to restrain it, but before an attachment will be granted it must be shown that the company has committed a breach of the injunction by not taking some precautions to prevent mischief, if they still allow the sludge to flow (*b*).

Proper use of stream. And it is incumbent on persons mining on Crown lands to use a stream flowing past the ground on which they are mining in such a way as not to injure the land or water of those below them; and persons throwing sludge on the land of another cannot in defence say that they only used a stream adjoining and flowing past the Crown lands on which they were mining and which afterwards flowed through plaintiff's land, for washing auriferous earth and for their mining operations and as an outlet for the water so used, and that thereby the stream became necessarily impregnated with earthy substances (*c*).

Right to use water. The holder of a head-race for mining purposes is entitled to have the water in its natural condition at the point

(*k*) *Lamont v. Stawell Road Board*, 1 W.W. & A'B. (L.) 79 (1864).

(*l*) *Shannahan v. Shire of Creswick*, 8 V.L.R. (L.) 342 (1882).

(*a*) *Bonshaw Freehold G.M. Co. v. Prince of Wales Co.*, 4 W.W. &

A'B. (E.) 126 (1867).

(*b*) *Seal v. Webster Street Freehold G.M. Co.*, 5 W.W. & A'B. (E.) 129 (1868).

(*c*) *Campbell v. Ah Cheong*, 1 V.R. (L.) 25; 1 A.J.R. 35; N.C. 68 (1875).

whence he is authorised to divert it (*d*); persons higher up the stream have no right to pollute it. The rights given to miners (*e*) to use the water of a stream, and their liability for obstructing the flow and polluting the water is fully discussed in a New South Wales case (*f*). It is no bar to the recovery of damages that without the pollution caused by defendants the water was sufficiently polluted by others to render it useless to the plaintiff (*g*); and a man who sets up a prescriptive right to pollute a stream must show that he has exercised it substantially to the extent claimed during the whole period of twenty years preceding the action; if during a substantial part of the period he has polluted to less extent he can only prescribe to that extent (*h*); and the law as to acquiescence and statutory right to foul a stream to the detriment of lower riparian owners as laid down in *Borton v. Howe* (*g*) has not been altered by subsequent legislation (*i*).

*Bk. III. Ch. III.
Sec. IV.*
Pollution of
stream.

A riparian owner, however, loses his peculiar rights when his land ceases to be in contact with the flow of the stream (*j*). It seems in New Zealand the riparian freeholder on each side of the stream is entitled to the soil *usque ad medium filum aquæ*. The common law right of a riparian proprietor is applicable to Australia, but is so far abridged by the Goldfields Act (*k*) as to give holders of miner's rights the power to divert and use the water of streams on private lands subject to regulations made under the Act, but the miners are not entitled to return the water into the stream in a polluted state (*l*).

Rights of
riparian owner.

The right of a licensee of a puddling site to allow sludge to pass over Crown lands is not an easement necessarily

Puddling right.

(*d*) *Guffie v. Christian*, 1 N.Z.J.R. (N.S.) S.C. 96 (1875).

(*e*) Under the Mining Act of New South Wales.

(*f*) *Lomax v. Jarvis*, 6 N.S.W. L.R. (L.) 237; 2 W.N. 33 (1885); and see cases therein cited.

(*g*) *Borton v. Howe*, 3 N.Z.C.A. 5; 2 N.Z.J.R. 97 (1875).

(*h*) *McIndoe v. Jutland Flat G.M. Co.*, 12 N.Z.L.R. 226 (1893).

(*i*) *McIndoe v. Jutland Flat G.M. Co.*, *supra*, affirmed by C.A., 14 N.Z.L.R. 99 (1895).

(*j*) *Melbourne Harbour Trust Commissioners v. Colonial Sugar Refining Co.*, 3 A.L.R. 231 (1897).

(*k*) 30 Vic. No. 32 (N.Z.), sec. 6.

(*l*) *Borton v. Howe*, 3 N.Z.C.A. 5; 2 N.Z.J.R. 97 (1875); *Jutland Flat (Waipori) G.M. Co. v. McIndoe*, 14 N.Z.L.R. 99 (1895).

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Sec. IV.

attached to his licence, and no such easement or right is possessed by a defendant who for years carried on mining operations with a puddling machine under such licence, and discharged sludge upon adjoining Crown land which was afterwards proclaimed reserved for the supply of a reservoir under the *Waterworks Statute (m)*. The flow of sludge from a puddling mill is tolerated from the nature of things, but the toleration of that nuisance is not necessarily the grant of a right to the licensee (*n*).

Pollution of
stream by
sludge.

An interlocutory injunction was granted to restrain the flow of sludge from the works of one mining company over the land of an adjoining mining company upon evidence that such sludge polluted a creek running through the plaintiff company's land, and rendered the water of the creek unfit for mining purposes; but was refused as to the mere flow of sludge over the surface of land in the occupation of a tenant. But where a tenant has granted permission to an adjoining mining company to run sludge over the surface of the land occupied by him, the reversioner is entitled to protect his land from an accumulation of sludge upon it which would permanently injure its value, but this case is not one for an interlocutory injunction (*o*); and in such a case probable future damage will not be considered (*p*).

Permission of
tenant.

Erection of
flume.

But a tenant may give permission, effectual as against his landlord during the tenancy, to a third person to construct upon the land occupied by him as such tenant a wooden flume or drainage channel, provided it does not injure the soil; but such permission will not afford evidence of a right in such third person as against the reversioner after the termination of the tenancy (*q*).

Diversion of
sludge.

And where sludge from the workings of a third person

(*m*) 29 Vic. No. 288; see 56 Vic. No. 1156.

(*n*) *Reg. v. M^cIntyre, ex parte Ah Hen*, 5 W.W. & A^b. (L.) 25 (1868).

(*o*) *Bonshaw Freehold G.M. Co. v. Prince of Wales Co.* (1), 4 W.W. & A^b. (E.) 126 (1867).

(*p*) *Dickson v. Western Freehold G.M. Co.*, 5 W.W. & A^b. (L.) 100 (1868).

(*q*) *Bonshaw Freehold G.M. Co. v. Prince of Wales Co.* (2), 5 W.W. & A^b. (E.) 140 (1868).

flows through the plaintiff's land, defendants have no right to divert such sludge into their own land, there to extract the water from it, and then restore the residue in a more mischievous form into the previous course down to the plaintiff's land (r). *Bk. III. Ch. III. Sec. IV.*

It is no defence to an application for injunction to aver that so many other persons contribute to a nuisance that it would be useless to restrain the defendants. If an injunction be granted restraining defendants from allowing sludge to flow on to plaintiff's land, the passage of sludge through a flume over the land of the plaintiffs is a breach of the injunction if not perfect and complete, so as to prevent the escape of sludge from the flume whereby it would flow over the land (s). *Escape of sludge from flume.*

The mining boards are authorised to make by-laws for preventing the accumulation and for the effective taking away and depositing in some convenient place of the sludge tailings and refuse matter oozing or flowing from any land worked by means of puddling, quartz crushing, or other machines (t), and for imposing rates on such land and machines for the purpose (u). *By-laws may be made.*

(r) *Bonshaw Freehold G.M. Co. v. Prince of Wales Co.* (2), 5 W.W. & A'B. (E.) 140 (1868).

(s) *Ibid.*
 (t) Act No. 1120, sec. 106 (xv).
 (u) *Ibid.*, sec. 106 (xvi).

CHAPTER IV.

SITES FOR RESIDENCE AND BUSINESS.

SEC. I.—UNDER THE MINING ACTS.
SEC. II.—RESIDENCE AREAS.

SEC. III.—BUSINESS LICENCES.

SECTION I.—UNDER THE MINING ACTS.

Bk. III, Ch. IV, Sec. 1. THE policy of the mining law of Victoria has always been to permit miners to occupy certain portions of Crown lands on a goldfield for the purpose of residence and business, and though no definite enactment was made with this view prior to *The Goldfields Act* of 1855 (*a*), yet the gold mining licences under the first mining Act passed in Victoria (*b*) authorised the holder of such licence “to mine or dig for gold or exercise and carry on any other trade or calling on such Crown lands as shall be assigned to him for these purposes”; and the same privilege was extended to holders of gold mining licences under the Amending Mining Act (*c*).

Right to reside on goldfields.

Digger's licence.

Under miner's right.

However, *The Goldfields Act* of 1855 (*d*) expressly enacted that the holder of a document which then first came into existence and was called a “miner's right” should be entitled

(*a*) 18 Vic. No. 37.

(*b*) 15 Vic. No. 15.

(*c*) 17 Vic. No. 4.

(*d*) 18 Vic. No. 37.

to occupy for the purpose of residence and business so much of Crown lands as should be allowed by rules to be framed under that Act. *Bk. III. Ch. IV. Sec. I.*

The same privileges were conferred by *The Goldfields Act* of January 1, 1858 (*e*); and by *The Mining Statute* 1865 (*f*) those privileges were continued and enlarged, permitting the holder of a miner's right, or any person on whose behalf a consolidated miner's right was held, to put up and remove any building, and to cut live and dead timber for the purpose of building for himself a residence or place of business on any Crown lands, the area of which was to be prescribed by the by-laws, but was not to exceed one acre in extent. This provision is consolidated in section 5 of the Act No. 1120. *Act No. 32.*
Act No. 291.

Under *The Mining Statute*, however, the title thus acquired to land on the goldfields for the purpose of residence or business was regulated solely by by-laws made in pursuance of the Act (*g*), and numerous difficulties resulting from this system arose from time to time which called for special legislation on the subject of these holdings. *The Residence Areas Act* 1881 was passed on December 4, 1881 (*h*) defining the meaning of a residence area, which theretofore was a term that had grown by custom to be applied to these titles, though never before expressed in any legislative enactment, and, without lessening the powers of the mining boards in making by-laws, providing for their registration, cancellation and transfer. This Act was subsequently amended by a further enactment, *The Residence Areas Act* 1884 (*i*), permitting the holder of a residence area to purchase the freehold of his holding under certain conditions, and by virtue of a still further amending Act (*j*) he was allowed to pay the purchase money of such freehold by instalments. These several Acts are now consolidated in the Act No. 1120, Part I, Div. I (4), which *Under the by-laws.*
Residence Areas Act.
Right of purchase.

(*e*) 21 Vic. No. 32.

(*f*) Act No. 291, sec. 5.

(*g*) Act No. 1120, sec. 106 (xi), (xii), (xiii).

(*h*) 45 Vic. No. 709.

(*i*) 48 Vic. No. 891.

(*j*) 52 Vic. No. 993; *The Residence Areas Act* 1888.

Bk. III. Ch. IV. Sec. 1. has been enlarged by the Act No. 1514, Part I, sub. 2.

These Acts and the by-laws of the several mining districts comprise the law relating to residence areas and business licences.

SECTION II.—RESIDENCE AREAS.

Apart from the provisions of *The Residence Areas Acts*, the Act No. 1120, sec. 5, in itself authorises the holders of miners' rights to occupy, for purposes of residence, land prescribed by the by-laws, and to erect and remove buildings. They are to be deemed to be possessed of such land, and may assign and encumber the same in such manner and subject to such regulations as to registry as the by-laws shall direct, and in default of such direction, either orally or by any instrument in writing. The authority thus conferred is extended by Part I, Div. I, sub. 4 of the Act No. 1120, consolidating the several *Residence Areas Acts*, and Part I, sub. 2 of the Act No. 1514.

Residence
included in
mining
purposes.

The definition of the term "mining purposes" in the Act No. 291, sec. 101 (iii), did not include residence, neither did the same expression in the Act No. 32, though by both of these Acts the holder of a miner's right was entitled to the privilege of residence on a goldfield (a); but by the Act No. 1120, sec. 135 (iii), it is enacted that these words shall include the occupation, possession, use or enjoyment of Crown lands under a business licence or for the purpose of residence, so as to confer on the Court of Mines and the Warden jurisdiction to determine suits for encroachment and trespass.

Other
States.

The like privilege of residence on a goldfield by virtue of a miner's right or business licence is given by the Mining Acts of all the other States (b).

(a) *Rosales v. Rice*, 1 V.R. (M.)
1; 1 A.J.R. 13 (1870).

(b) 56 & 57 Vic. No. 587 (S.A.),
sec. 33 (ii), by means of a residence

A residence area is defined to mean, unless the context is inconsistent with such construction, any Crown land on any goldfield, not exceeding in area one acre, occupied for the time being in accordance with the provisions of the Act and of the by-laws of the mining district by the holder of a miner's right or business licence for the purpose of residence, or of residence and carrying on business (c).

Bk. III, Ch. IV, Sec. II.
What is a residence area.

But though the holder of a miner's right is entitled to take up a residence area not exceeding one acre in extent, a person is not allowed to take up a residence area in respect of land under one acre, and then to add to it other residence areas for adjoining land until the total extent of such land so taken reaches to one acre; if he has once taken up a residence area he may not have another within ten miles of the first residence area (d), even though the two combined do not exceed one acre in extent (e). Section 5 of the Act No. 1120 authorises the occupation of not more than one piece of land for the purpose of residence, but section 29 permits of an additional residence area being taken. If a second residence area is taken up it must be situated beyond ten miles from the residence area on which the holder actually resides, and a separate miner's right or business licence must be held for each residence area (f).

Taking two areas.

Under the Act No. 1120, Part I, a married woman living with her husband, who obtains money from him and with it buys a miner's right, may acquire a residence area in her own right, and may sublet or assign such area; and where the by-laws required the holder of a residence area to reside on it, residence by her or her assigns was held to be a sufficient compliance (g). And a resident on a goldfield

Who may hold residence area.

area; and *Ibid*, sec. 69, by occupation licence; 59 Vic. No. 40 (W.A.), secs. 9, 16; 62 Vic. No. 24 (Q.), secs. 15 (5), (6), 17; also providing for miners' homestead leases, *Ibid*, Part VIII, sec. 71; 37 Vic. No. 13 (N.S.W.), sec. 15 (i); 57 Vic. No. 24 (Tas.), secs. 28, 30; also providing for holdings for cultivation (sec. 129); 62 Vic. No. 38 (N.Z.), sec. 117; and 63 Vic. No. 29 (N.Z.), sec. 5.

(c) Act No. 1120, sec. 27.
(d) Act No. 1120, sec. 29.
(e) *Thomas v. O'Donnell*, 19 V. L.R. 401 (1893).
(f) Act No. 1120, sec. 29. A similar law obtains in Tasmania; 59 Vic. No. 35 (Tas.), sec. 3.
(g) *Foley v. Norton*, 4 V.L.R. (M.) 13 (1878); *Reardon v. Norton*, 5 V.L.R. (M.) 12 (1879); as to assignment of residence areas, see Act No. 1120, secs. 5, 39, 40.

Bk. III. Ch. IV. Sec. II. holding a miner's right, who, though not engaged in mining, was the holder of a water-race under the by-laws, was held to be entitled to a residence area (*h*). The privilege of residence now seems to be extended to any holder of a miner's right during its continuance (*i*) or of a business licence (*j*), subject to the provisions of the Act and to the by-laws.

Meaning of "holder."

The holder of a residence area means the holder of a miner's right or business licence who is for the time being entitled to occupy a residence area under the Act (*h*), but land already occupied cannot be taken for the purpose of residence without the consent of the occupier; so, a residence area may not be taken up on a frontage claim against the will of the owner of the claim (*l*). But the marking out of a residence area, as distinguished from a claim, pending the application for a lease of the same land is not illegal and useless, except as against the applicant for lease, and then only if the lease be ultimately granted (*m*).

Prior occupation.

Assignment of residence area.

A holder of a residence area was held to be entitled under the Act No. 291 (*n*) to assign or sublet his holding, unless such right were restricted by the by-laws (*o*), provided the sub-tenant were the holder of a miner's right; otherwise the lessor could not recover for use and occupation from his tenant (*p*), nor could he recover possession (*q*). By the Act No. 1120, Part I, Div. 1 (4), a holder is, however, expressly empowered to let, sell, or transfer his residence area, provided the sale or transfer be to the holder of a miner's right or business licence, and be registered by the mining registrar (*r*).

(*h*) *Campbell v. M'Intyre*, Ch. Ct. of Mines, Sept. 2, 1869; *Argus*, Sept. 3, 1869; N.C. 12.

(*i*) Act No. 1120, sec. 5.

(*j*) *Ibid.*, sec. 12.

(*k*) *Ibid.*, sec. 27.

(*l*) *Warrior G.M. Co. v. Cotter*, 3 W.W. & A.B. (M.) 81 (1866).

(*m*) *Gorman v. M'Lellan*, 14 V. L.R. 674; 10 A.L.T. 51 (1888).

(*n*) Before the express right to

assign was given by *The Residence Areas Act*.

(*o*) *Reardon v. Norton*, 5 V.L.R. (M.) 12 (1879); see Act No. 1120, sec. 5.

(*p*) *Jones v. Joyce*, 3 V.R. (L.) 209; 3 A.J.R. 105 (1872); *Ex parte Young*, 4 A.L.T. (1883).

(*q*) *Summers v. Cooper* (1), 5 V. L.R. (M.) 22; 1 A.L.T. 46 (1879).

(*r*) Act No. 1120, secs. 39, 40.

Under the Mining Act of Queensland it was held that actual personal occupation of a residence area by the owner was not necessary, and he might occupy it by his agent (s); but under the Act of New South Wales, where the holder of a residence area sublet it and did not sleep on it, though he occupied it during the day, it was held that he had abandoned it (t).

*Bk. III. Ch. IV.
Sec. II.*
Occupation.

An incorporated company is incompetent to occupy land as a residence area (u), and *quære* whether the title to a residence area would not be determined on its being transferred to a trustee for a corporate company (v).

Cannot be held by a company.

Under the Act No. 291 (w) the holder of a residence area might maintain an action for encroachment against persons mining on the land included in his residence area, the subject of an application for lease, before such application had been dealt with (x); and the surface of land held as a residence area or under business licence was not to be taken from the surface occupier without his consent, though a claim might include a residence area, unless the land were exempted from occupation as a claim, and if a claim were included such area might be mined upon, subject to liability for disturbing the surface (y).

Encroachment on residence area.

The Crown had no power under *The Mining Statute 1865* to grant a gold-mining lease conferring on the lessee a right to mine under a residence area acquired prior to the application for the lease (z), and a person taking up a claim over a residence area acquired no title to such claim as against the holder of the residence area or anyone else (a). Land

Mining lease of residence area.

(s) *Kennedy v. Neill*, 1 Q.L.J. 65 (1882).

(t) *Teeloy v. Ross*, 1 W.N. (N.S.W.) 94 (1894).

(u) *Warrior G.M. Co. v. Cotter*, 3 W.W. & A'B. (M.) 81 (1866).

(v) *Fancy v. Billing*, 7 V.L.R. (M.) 13; 3 A.L.T. 17 (1881).

(w) See No. 1120, sec. 5.

(x) *Fahey v. Koh-i-noor Q.M. Co.*, 3 W.W. & A'B. (M.) 4 (1866). See Act No. 1120, sec. 44, as to leases below residence areas.

(y) *Parade G.M. Co. v. Royal*

Harry Q.M. Co., 2 V.L.R. (L.) 214 (1876); see *Re Rogers, ex parte Bunn*, Sp. Ct. Vic. Nov. 24, 1859; A.R., Nov. 25, 1859; but *quære* whether the land could now be held under two titles; Act No. 1514, secs. 43, 47.

(z) *Jones v. Christensen*, 7 V.L.R. (M.) 6; 2 A.L.T. 149 (1881).

(a) *St. George and Band of Hope Co. v. Band of Hope and Albion Consols*, 2 V.R. (E.) 206; 2 A.J.R. 81, 127 (1871).

*Bk. III. Ch. IV.
Sec. II.*

held as a residence area was in the same category with land proclaimed as a street or road, on the assumption that no sound distinction could be drawn between surface applied to a public use, whether it be a street or a reserve for recreation, and surface applied to the purpose of a residence area (*b*). Every residence area is now exempted from occupation for mining purposes under a miner's right (*c*), and any person, except the holder of a lease granted under the Act, who mines under a residence area is liable on conviction to a heavy penalty (*d*).

Lease may be granted.

But though a residence area is exempted from occupation as a claim, a gold-mining lease may be granted under the *Mines Act* 1890, Part I, Div. 1 (4) to be effectual below the surface of a residence area at such distance below the surface as shall be not less than one hundred feet, provided the safety of any buildings on it is not endangered (*e*), and leases of land which include land occupied as a residence area, or under business licence, granted before the passing of *The Residence Areas Act*, are valid and effectual in all respects, as if such leases had been granted with the consent of the holder of such residence area or business licence (*f*).

Principle of *Critchley v. Graham* applies.

The principle of *Critchley v. Graham* (*g*) applies to the case of a residence area (*h*), and where one person is in actual occupation of a residence area under a claim of right no other person can acquire title to the same land by merely marking it out, without first instituting proceedings to dispossess the occupant (*i*); and where one person was registered as the holder of a residence area, no other person could become registered in respect of the same residence area without first instituting proceedings to have the prior registration cancelled (*j*).

(*b*) *Parade G.M. Co. v. Royal Harry Q.M. Co.*, *supra*.

(*c*) Act No. 1120, sec. 43.

(*d*) *Ibid*, sec. 47.

(*e*) Act No. 1120, sec. 44; Act No. 1514, sec. 18.

(*f*) Act No. 1120, sec. 46.

(*g*) 2 W. & W. (L.) 211 (1863).

(*h*) *Warrior G.M. Co. v. Cotter*, 3 W.W. & A.B. (M.) 81 (1866).

(*i*) *Fancy v. Billing*, 7 V.L.R. (M.) 13; 3 A.L.T. 17 (1881). As to the effect of registration of a residence area, see the Act No. 1120, Part I, Div. I (4).

(*j*) *Reid v. Gunn*, 13 V.L.R. 723

The Warden has jurisdiction under the Act No. 1120, *Bk. III. Ch. IV. Sec. II.* Part I, to hear and determine suits for possession of or trespass upon land held as a residence area (*k*); and the holder of a residence area, having no right to mine on it, may by mining encroach on the rights of the mining public, and may be restrained (*l*). For the holder of a licence to occupy ground in order that he may build a house to live in, and cultivate a garden around it, or to conduct any other occupation thereon, is not allowed by virtue of such licence to mine on the land himself, neither has he any right to permit others to do so (*m*). *Jurisdiction of Warden.* *Holder cannot mine on area.*

The Warden has jurisdiction to entertain a complaint for forfeiture of a residence area for non-payment of a lien to secure which such area has been transferred to the plaintiff, but the defendant might have a suit for redemption on payment of the amount of the lien, and any such proceedings should be taken under both sections 135 (iii) and 216 of the Act No. 1120; and if a husband and wife are both in possession of the residence area, both may be sued; the Warden's order should be drawn up directing the husband to give up possession, and directing the wife not to withhold possession (*n*). *Forfeiture of residence area.*

An owner losing possession of a residence area by the Warden's order authorising a complainant to be put in possession of it is by the Act allowed a reasonable time for removing erections and fixtures on it; but it seems the words "at any time" in section 5 of the Act No. 1120 should be taken to mean during the currency of his miner's right (*o*). *Removal of buildings.*

(1887); see Act No. 1120, sec. 28. This case is, however, now met by the Act No. 1514, sec. 17, which provides that no registration made before the passing of the Act shall be invalidated by reason that a previous registration thereof had not been cancelled, if it were proved that the miner's right under which it was held had expired, or that the residence area had been abandoned.

(*k*) Act No. 1120, secs. 135 (iii),

216; and see sec. 32.

(*l*) *Warrior G.M. Co. v. Cotter*, 3 W.W. & A'B. (M.) 81 (1866).

(*m*) *St. George and Band of Hope Co. v. Band of Hope and Albion Consols*, 2 V.R. (E.) 206; 2 A.J.R. 81 (1871).

(*n*) *Fitzgerald v. Elliott*, 5 A.J.R. 3 (1874).

(*o*) *Summers v. Cooper* (3), 7 V.L.R. (L.) 443; 3 A.L.T. 61 (1881).

Bk. III, Ch. IV.
Sec. 11. ^g

Cancelling
registration.

Under the Act No. 1120, Part I, Div. I (4) the Warden has jurisdiction to order cancellation of the registration of the holder of a residence area, if such holder cease to have a miner's right or business licence, or if he has illegally obtained registration (*p*), or if after four months from the registration no habitable dwelling is erected thereon, and there has not been a habitable dwelling erected thereon for at least three consecutive months; and the registration is thereupon cancelled by the mining registrar, and the land ceases to be a residence area (*q*). The dwelling must be placed on the land registered as a residence area, and not upon adjoining land illegally taken up by the holder as a second residence area, or the registration of the residence area on which there is no dwelling may be cancelled (*r*). Where the registration is cancelled the Warden may by the same or a subsequent order direct the person on whose application it has been cancelled to be registered as the holder of such residence area, provided the nature of the order required is stated in the summons (*s*).

Uncertificated
insolvent.

An uncertificated insolvent who holds a miner's right and is in possession is entitled to maintain a complaint before the Warden for trespass on his residence area, if his assignee do not intervene, and the assignee is not a necessary party to the proceedings (*t*).

Registration.

Registration is part of the title to a residence area in addition to the right of occupation, and the Act makes registration necessary to constitute a complete right of occupation, whether on a first taking up (*u*) or on acquiring title by assignment (*v*); and the operative registration is the one having priority in point of time (*w*). But the land must be properly marked out, and if the holder of a miner's

(*p*) Act No. 1120, sec. 32. Compare 62 Vic. No. 38 (N.Z.), sec. 151 (4).

(*q*) Act No. 1120, sec. 33.

(*r*) *Thomas v. O'Donnell*, 19 V.L.R. 401 (1893).

(*s*) Act. No. 1514, sec. 15.

(*t*) *Fancy v. North Hurdysfield*

United Co., 8 V.L.R. (M.) 5; 3 A.L.T. 89; see *Madden v. Hetherington*, 3 V.R. (L.) 68; 3 A.J.R. 41 (1872).

(*u*) Act No. 1120, sec. 28.

(*v*) *Ibid.*, sec. 5.

(*w*) *Reid v. Gunn*, 13 V.L.R. 723.

right marks out a small plot of ground for a residence area and then registers himself for a much larger area, the registration is bad, and a transfer by such holder, even though registered, will be bad also (*x*). *Ek. III. Ch. IV. Sec. II.*

A notification of the registration of a residence area is endorsed by the mining registrar on the miner's right under which it is held, a similar endorsement being made on each successive renewal of the miner's right (*z*), and this registration may be cancelled by the Warden if the holder ceases to hold a miner's right or business licence, or has obtained registration illegally (*a*). The title of the holder, however, does not necessarily determine upon lapse of his miner's right, but becomes voidable only during the period for which he has no miner's right; the words of section 32 are "if he is no longer the holder of a miner's right" (*i.e.*, at the time it is sought by any person to have the registration cancelled), and if he becomes later on the holder of a miner's right before proceedings are commenced, his title to the residence area is redeemed and cannot be impeached on the ground that a lapse has taken place, and he has not been since the registration of the area the continuous holder of a miner's right (*b*). *How effected.*
Vial v. Allender.

As before stated, in the event of the registration of a residence area being cancelled by the Warden the holder was permitted under the Act No. 1120, sec. 5, to remove from the holding any buildings plant and fixtures he might possess on it, within a reasonable time (*c*). The erection of buildings and fixtures is necessarily entailed in mining on Crown lands, and should all claim to these erections be lost as soon as the holder lost his right of occupation a serious check would be given to an industry which Parliament sought to encourage (*d*). This question was decided before *Time allowed for removal of plant.*

(*x*) *Galsworthy v. Collins*, 14 A.L.T. 174 (1892).

(*z*) Act No. 1120, sec. 30.

(*a*) *Ibid.*, secs. 32, 33.

(*b*) *Vial v. Allender*, (F.C.), 23 V.L.R. 516; 19 A.L.T. 161; 4 A.L.R. 17 (1898); over-ruling *Abraham v. Della Ca* (1), 23 V.L.R.

338; 19 A.L.T. 92; 3 A.L.R. 260 (1897); followed in *Truswell v. Woods*, 5 A.L.R. 62; 20 A.L.T. 210; 24 V.L.R. 742 (1899).

(*c*) Act No. 1120, sec. 5.

(*d*) *Summers v. Cooper* (3), 7 V.L.R. (L.) 443; 3 A.L.T. 61 (1881).

Bk. III. Ch. IV.
Sec. II.

the passing of the Act No. 1514, which now enacts that when the registration of a residence area is cancelled by the Warden the person who was registered may within such time after making the order of cancellation as may be fixed by the Warden in such order remove his buildings, plant and fixtures from the land; previously it was necessary for the holder to remove his plant within a reasonable time, and before any other person had lawfully entered into possession (e).

Failure to
remove plant.

If the owner of the buildings, plant and fixtures do not remove them within the time fixed by the Warden, the person upon whose application the order of cancellation was made may call upon him to show cause why such buildings and plant should not be sold by auction and removed, and in default of removal, or in the absence of sufficient cause shown, the Warden may order the same to be sold and removed, and the proceeds of sale paid to the person entitled (f). Under a Queensland Mining Act (g), where valuation for improvements on a residence area was to be made by the Warden on cancellation of the registration of such residence area, it was necessary for the Warden to make the valuation himself, and he had no jurisdiction to delegate the valuing of such improvements to arbitrators (h).

Exemption of
land from
occupation.

Where land is by *Gazette* notice exempted from occupation for mining, residence or business purposes (i), such notice is a determination of the occupation, but a person in lawful occupation of a residence area before publication of the notice in the *Gazette* is entitled to a demand for possession before a summons is issued against him for being in illegal occupation of Crown lands, though a previous conviction for being in unauthorised occupation is sufficient notice (j); but land held *bona fide* as a residence area

(e) Act No. 1514, sec. 16 (1);
Summers v. Cooper (4), 8 V.L.R.
(L.) 274; 4 A.L.T. 57 (1882).

(f) Act No. 1514, sec. 16 (ii),
(iii).

(g) 38 Vic. No. 11 (Q.); Reg. 32.

(h) *Smyth v. Missingham*, 8 Q.L.J.
(N.C.) 26 (1893).

(i) Act No. 1120, sec. 17.

(j) *Reg. v. Dowling, ex parte
McLean*, 2 V.R. (L.) 61; 2 A.J.R.
56 (1871); *Wakeham v. Cobham*,
1 V.R. (M.) 34; 1 A.J.R. 93
(1870); see *Mayor &c. of Ballarat
v. Bungaree Road Board*, 1 V.R.
(E.) 57; 1 A.J.R. 49 (1870).

cannot lawfully be exempted from occupation as a residence area until compensation has been made for improvements made or erected on it (*k*). And where land was temporarily reserved for public purposes, and permissive occupancy was given to a municipal council for the supply of gravel, the occupancy of the holder of a residence area, even with the acquiescence of the council, to whom he had paid rates, was held to be determined by a subsequent exemption of the land from occupation for mining purposes, and the council had sufficient possession to maintain trespass, and the holder of the residence area was adjudged a trespasser (*l*). The Warden has no jurisdiction (*m*) to entertain an application by the holder of a miner's right to have the registration of a residence area cancelled on the ground that the land has been exempted from occupation for mining purposes. The plaintiff himself could have no right to occupy the residence area if the defendant were got out of it; he has no personal interest, and no lawful right to complain of the wrongful occupation, and his miner's right does not give him authority to adopt the legal rights of the Crown (*n*).

The holder of a residence area has the exclusive right to occupy the surface of it, except as against the Queen (*o*), and may let, sell, or encumber such area (*p*), provided such sale or transfer is registered with the mining registrar (*q*). But such letting or sale must be in accordance with the Act. Thus, where an agreement was entered into by A with B, who was a woodcarter, that in consideration of A allowing B the use of a road across a residence area in the occupation of A, B would pay 2s. 6d. per load of wood carted, it was held that this was only a personal licence, and not an assignment of any portion of the residence area, and did not create any interest in the land as regarded B (*r*). The

(*k*) Act No. 1514, sec. 24.
 (*l*) *Mayor &c. of Sandhurst v. Graham*, 3 V.R. (L.) 191; 3 A.J.R. 79 (1872).

(*m*) Act No. 1120, sec. 32.
 (*n*) *Hanton v. Forbes*, 24 V.L.R. 21; 20 A.L.T. 30; 4 A.L.R. 163

(1898).

(*o*) Act No. 1120, sec. 35.
 (*p*) *Ibid*, sec. 39, 40, 5.
 (*q*) *Ibid*, sec. 41.

(*r*) *Rinaldi v. Milano*, 8 A.L.T. 5 (1886).

Bk. III. Ch. IV.
Sec. II.

assignment of a residence area and its registration are regulated by the by-laws; a transfer of a miner's homestead lease under the Queensland Act (s) could only be effected as prescribed by the Act itself, and a transfer not in the prescribed form did not pass any interest (t).

Cannot be taken
as a claim.

A residence area is exempt from occupation for mining purposes under a miner's right, and therefore in view of the Act cannot be taken as a claim (u); but, as already shown, the land included in a residence area may be applied for and taken under a gold-mining lease, provided the lessee covenant to make good any damage caused by subsidence (v). The occupation of land as a residence area gives the holder no title to tailings on the land (w).

Claimholder
may not reside
on claim.

The holder of a claim does not by acquiring such claim acquire a right to reside on it, for the right to occupy a claim under a miner's right does not give the right to occupy it for the purpose of residence; though the right to occupy for mining purposes might be an answer to an attempt to evict the occupant for unauthorised occupation (x).

The language of section 5 of the Act No. 1120, and the long recognised practice under the section, forbid the contention that the holder of a miner's right can at the same time occupy, by virtue of his miner's right only, for mining purposes and also for residence. He may not be turned out, and may still mine on the land, but he will be liable to a penalty for occupying the land in an unauthorised way by residing on it, and may continue to be punished so long as he continues to do the unauthorised act (y).

Land in legal
occupation.

A holder of a miner's right cannot occupy as a residence area part of a claim already in the legal occupation of

(s) 50 Vic. No. 32 (Q.), sec. 21.
(t) *Hutton v. Morris*, 8 Q.L.J. (N.C.) 30 (1893); see the present Act 62 Vic. No. 24 (Q.), Part VIII, sec. 71.

(u) Act No. 1120, secs. 43, 47.

(v) *Ibid.*, secs. 44, 45, 46.

(w) *Sydenham Q.M. Co. v. Ah Cheong*, 23 V.L.R. 441; 19 A.L.T.

138; 3 A.L.R. 270 (1897).

(x) *McLean v. Wearn*, 1 A.J.R. 152 (1870); *Wakeham v. Cobham*, 1 V.R. (M.) 34; 1 A.J.R. 93 (1870); *Reg. v. Dowling, ex parte McLean*, 2 V.R. (L.) 61; 2 A.J.R. 56 (1871).

(y) *Bannerman v. Sexton*, 16 V.L.R. 601; 12 A.L.T. 96 (1890).

another person, if the surface so sought to be occupied for residence is required for the purposes of the claim; if the claimholder seeks to eject the holder of a residence area in occupation of part of his claim, he must prove that he requires the use of the surface of the claim in dispute for gold-mining purposes, but it is not necessary to prove that he had actually used it for those purposes (z).

When buildings have been erected on a residence area by the holder, who has remained in possession for two years and a half, he has the right to purchase the land under certain conditions (a); and where the residence area is situated on the surface of land comprised in a gold-mining lease, and the surface is not required for mining or public purposes, the holder of a residence area has a similar right of purchase of the surface, at a valuation to be determined by an appraiser appointed by the Board of Land and Works (b).

SECTION III.—BUSINESS LICENCES.

By the interpretation clause of sub. 4, Part I, Div. I, of the Act No. 1120 (sec. 27) a business licence is included in the term "residence area," so far as that part of the Act is concerned, and land held under such licence is subject to the provisions of the Act relating to residence areas. A business licence must be registered in the same manner as a residence area (c).

A business licence is issued under the authority of section 11 of the Act No. 1120, and entitles the holder thereof during its continuance to occupy on any goldfield so much Crown lands as the by-laws may prescribe, not exceeding one acre, for the purpose of residence and carrying on business, with the right to put up and remove buildings and

(z) *Llanberis Q.M. Co. v. Jones*,
Sp. Ct. Vic., Nov. 12, 1890; *Argus*,
(Legal Notes), Nov. 13, 1890.

(a) Act No. 1120, sec. 36.
(b) Act No. 1514, sec. 19.
(c) Act No. 1120, sec. 28.

Bk. III. Ch. IV. Sec. III. other erections. The property in the land is a chattel interest, and no person is entitled by virtue of his licence to occupy more than one such portion of land (*b*). Under a New Zealand Act (*c*) a business carried on by a mining agent on the goldfields was held not to be a business within the meaning of the Act (*d*).

Dealings.

A business licence and the land held by virtue of it may be sold and transferred (*e*), and may be encumbered (*f*), and on the death or insolvency of the holder will devolve on his personal representatives, or assignee in insolvency (*g*); and generally the same law that applies to residence areas is applicable also to business licences (*h*). The holder of a business licence need not hold a miner's right, and consequently his licence confers on him no right to mine on the land; it is held simply for the purpose of residence and carrying on business, and is exempted from occupation under miner's right for mining purposes (*i*).

No right to mine.

Proof of right to occupy.

Where a person was charged under the Act No. 32, sec. 116, with carrying on business on a goldfield without a licence, it was held that the onus lay on the defendant to prove his right to occupy; it was not for the prosecution to prove that he had not a licence, but for the defendant to prove that he had one (*j*).

Determination of occupation.

Occupation under a business licence may be determined by notice in the *Gazette* exempting the land from occupa-

(*b*) Act No. 1120, sec. 12. As to similar licences in the other States, compare 56 & 57 Vic. No. 587 (S.A.), sec. 65; 37 Vic. No. 13 (N.S.W.), sec. 22; 62 Vic. No. 24 (Q.), sec. 17; 59 Vic. No. 40 (W.A.), sec. 9; 57 Vic. No. 24 (Tas.), sec. 28; 63 Vic. No. 29 (N.Z.), sec. 5. In New Zealand, under the Act 50 Vic. No. 51 (N.Z.), the Warden had power to grant an occupation licence without the consent of the pastoral tenant of the land under the Act 49 Vic. No. 59 (N.Z.); *In re Beattie*, 8 N.Z.L.R. 256 (1889); see Act 62 Vic. No. 38 (N.Z.), sec. 124.

(*c*) 30 Vic. No. 32 (N.Z.), sec. 5.

(*d*) *Inspector of Licences v. Enright*, 1 N.Z.L.R. (N.S.) M.L.

26 (1867).

(*e*) Act No. 1120, sec. 13.

(*f*) *Re Keith, ex parte Joss*, 7 N.S.W.B.C. 75 (1897).

(*g*) Act No. 1120, sec. 13. Under the Mining Act of New South Wales it was held that land held under business licence was not subject to the provisions of the *Bankruptcy Act*; *Re Keith, ex parte Joss, supra*.

(*h*) See *ante*, Sec. II, "RESIDENCE AREAS."

(*i*) Act No. 1120, sec. 43.

(*j*) *McCormack v. Murray*, 2 W. & W. (L.) 122 (1863). A charge of this nature would not arise under the Act No. 1120.

tion for business purposes (*k*), but the holder of a licence is entitled to a demand of possession before being proceeded against for being in unauthorised occupation of Crown land (*l*), and he is entitled to compensation (*m*). A business licence under the Mining Act of New South Wales (*n*) is, like an ordinary licence, revocable at the will of the grantor, though it cannot be revoked until the expiration of the time for which it has been granted; and when the land is proclaimed exempted from occupation while the licence is in force, and such licence is afterwards renewed, the rights of the occupier continue notwithstanding the proclamation (*o*).

*Bk. III. Ch. IV.
Sec. III.*

Revocation of
Licence.

The Warden has jurisdiction to put a complainant in possession of land held under business licence, and may cause the defendant's buildings to be removed (*p*). But where the Warden dismissed a complaint seeking recovery of possession of a residence area, and on the soil were erected certain buildings and fixtures belonging to the complainant, it was held that the Warden had no jurisdiction to deprive the complainant of the buildings and fixtures (*q*).

Jurisdiction of
Warden.

When any land held *bonâ fide* for residence or business on which any building or erection has been put up is sold by the Crown the value of the buildings and erections is to be valued under the Act (*r*), and the holder of the licence is to have the value (*s*).

When land sold
by the Crown.

Registration is essentially necessary to the validity of title by business licence coupled with residence, and the registration of the licence is effected by endorsement by the mining registrar on the licence of a notification of the fact of such registration, in the same manner as the registration

Registration.

(*k*) Act No. 1120, sec. 17; No. 1514, sec. 11.

(*l*) *Reg. v. Dowling, ex parte M'Lean*, 2 V.R. (L.) 61; 2 A.J.R. 56 (1871).

(*m*) Act No. 1514, sec. 24.

(*n*) 37 Vic. No. 13 (N.S.W.), secs. 22, 26.

(*o*) *Wilkinson v. Harris*, 9 N.S. W.L.R. (L.) 70; 4 W.N. 159 (1888); *Wakeham v. Cobham* (1

V.R. (M.) 34; 1 A.J.R. 93) not followed.

(*p*) Act No. 1120, secs. 32, 33; Act No. 1514, secs. 15, 16.

(*q*) *Summers v. Cooper* (3), 7 V. L.R. (L.) 443; 3 A.L.T. 61 (1881).

See Act No. 1514, sec. 16, as to removal of buildings and erections.

(*r*) Act No. 1120, secs. 22, 23, 24.

(*s*) *Ibid*, sec. 25.

Bk. III. Ch. IV. of a residence area is endorsed on the miner's right under
Sec. III. which it is held (*t*).

Title similar to
residence area.

It may be said that in almost all respects the title under a business licence is on an equal footing with the title under miner's right of a residence area, and is governed by the clauses referring to residence areas in Part I, Div. I, sub. 4 of the Act No. 1120, and Part I, sub. 2 of the Act No. 1514 (*u*).

(*t*) Act No. 1120, secs. 28, 30.

(*u*) See *ante*, Sec. II, "RESIDENCE AREAS."

BOOK IV.

MINING JUDICATURE.

CHAPTER I.

MINING COURTS OF JUSTICE.

THE first Mining Act passed in Victoria (*a*) authorised the appointment of commissioners of Crown lands, afterwards known as Goldfields Commissioners, who were empowered to enquire into all cases of trespass and encroachment, and to determine the same in a summary way, in addition to other powers conferred on them, which, however, were restricted to the requirements of the small claims then permitted to be taken up. These matters of encroachment and trespass, and disputes between adjoining claimholders as to boundaries, were invariably settled by the Commissioner on the ground in the presence of the parties after personal inspection; the decision of the Commissioner was

Bk. IV. Ch. I.
Goldfields
Commissioners.

(*a*) 15 Vic. No. 15.

Bk. IV. Ch. I. final and conclusive, the "court" being held in a rough and ready fashion on the claim itself.

Power of justices.

The judicial powers of the Commissioners were much enlarged and more clearly defined by the next following Goldfields Act (*b*), and in addition to the powers vested in the Commissioners, two justices were authorised to award damages for encroachment and trespass, and to adjudicate in cases of mining partnerships where the balance did not exceed two hundred pounds. The procedure in these cases was the same as that in an ordinary police court.

Inefficiency of the system.

But as the mining industry extended, this somewhat perfunctory means of settling disputes between miners was found to be altogether inefficient for the purpose of administering justice. It sufficed for the cases of single claim-holders, whose claims were mere shallow workings and very limited in area, but when a number of mates banded themselves together and formed partnerships or companies to work leads and the deeper alluvial strata, it was seen that something more was required for the settlement of disputes than the *ipse dixit* of a Goldfields Commissioner, from which there was no appeal.

Local courts.

Accordingly in June, 1855, another Goldfields Act was passed (*c*), repealing the former Act, and instituting certain tribunals known as local courts, consisting of a chairman appointed by the Governor-in-Council and nine members, each of whom was required to be the holder of a miner's right, and was elected by the general body of miners. These local courts had power to make regulations, known as local court regulations, as to the extent and position of claims, the mode of taking them up, etc., and the local court regulations were the local laws which in many respects answered the purposes of the present by-laws.

Wardens of the goldfields.

This Act continued in force until the year 1858, when a further mining Act was passed (*d*) by which the local courts

(*b*) 17 Vic. No. 4.
(*c*) 18 Vic. No. 37.

(*d*) 21 Vic. No. 32.

were swept away, and in their place Wardens were appointed for the various mining districts established by the Act, with jurisdiction to hear and determine all disputes between miners, as well as suits for encroachment, trespass, forfeiture and abandonment. The Act also erected Courts of Mines for the several mining districts, with an original jurisdiction to adjudicate on mining disputes within their respective districts, and a right of appeal to this court was given from the decision of the Warden, a right of appeal being also established from the Court of Mines to the Supreme Court. In place of the local court regulations authority was given for the making of by-laws by an elective body called the mining board to be established for each mining district.

Ek. IV. Ch. I.

By-laws.

In the year 1865 the statute mining law was still further amended by *The Mining Statute (e)*, which repealed the Act No. 32, and which continued and greatly enlarged the powers and provisions of the repealed Act. By *The Mining Statute* 1865 a new court was erected, styled the Court of the Chief Judge of Courts of Mines, which was entirely an appellate court. The Warden or the judge of the Court of Mines was empowered to state a special case for the opinion of the Chief Judge on any point of law, and the Act also established a right of appeal to the Court of the Chief Judge from any decree or order of the Court of Mines, or from the order of any judge thereof.

Act No. 291.

Appellate court.

Subsequently, in the year 1872, an amending Act was passed (*f*), principally regulating the machinery of appeals from the Warden and from the Court of Mines, and providing for other necessary amendments of the Act No. 291, including authority to either party to a suit before the Warden, or upon the hearing or re-hearing of any appeal from the Warden, to apply to the judge or the Warden to state a special case for the opinion of the Chief Judge.

Act No. 446.

(e) 29 Vic. No. 291.

(f) 36 Vic. No. 446.

Bk. IV, Ch. I.
 The Court of the
 Chief Judge
 abolished.

The Court of the Chief Judge of Courts of Mines was, however, abolished by *The Judicature Act 1883 (g)*, and the jurisdiction theretofore vested in that court was transferred to the Supreme Court, except as to business pending at the time the Act came into operation (July 1, 1884). The right of appeal from the Court of Mines, and of stating a case by the judge of that court or by the Warden, given by the Acts No. 291 and No. 446, exists under the present law, except that such appeal is now made to the Full Court (*h*), and such special case is now stated for the opinion of the Supreme Court instead of for that of the Chief Judge (*i*).

Consolidation.

These Acts with others relating to residence areas, drainage of mines, regulation of mines, and mining on private land, have been consolidated in the present *Mines Act 1890* (No. 1120), which has been amended, chiefly with respect to the law of mining on private land and the regulation of mines, by the *Mines Act 1897* (No. 1514).

Division of the
Mines Act 1890.

Part I of the *Mines Act 1890* comprises two divisions, viz. (1) Mining Management, and (2) Courts and Procedure, the former dealing with mining interests in Crown lands under miners' rights and gold-mining leases, and the latter with mining judicature, which will be considered in the following chapters (*j*). Part II of the Act, "Mining on Private Property," and Part III, Division I, "Regulation and Inspection of Mines and Mining Machinery," have been repealed by the Act No. 1514.

Appeal in the
 other States.

In none of the other States is a Court of Mines established identical with that erected under the Victorian Act, although each State is provided with machinery for appeal from the decision of the Warden. In all of them, except in

7. (g) 47 Vic. No. 761, secs. 4, 5, 6,
 (h) Act No. 1120, sec. 210.
 (i) *Ibid.*, secs. 209, 265.
 (j) The Mining Acts of Victoria

(No. 1120 and No. 1514) are comprised in the Appendix, *post*, with comparative references to analogous sections in the Acts of the other States.

Tasmania, the Warden holds a "court," as distinguished Bk. IV. Ch. I. from the Victorian procedure, under which all proceedings are taken "before a Warden of the Goldfields." In New N. S. Wales. South Wales the jurisdiction and practice of the Warden's Court are almost identical with the jurisdiction of the Warden and practice before him under the Act No. 1120 (*k*), and a right of appeal from his decision is authorised to the District Court sitting as a Court of Appeal in its mining jurisdiction (*l*), with a further right of appeal from such Court to the Supreme Court; the Warden in this State may also summon assessors to adjudicate with him (*m*). In New New Zealand. Zealand the powers and procedure are somewhat similar (*n*), while in Western Australia the appeal from the Warden is Western Australia. direct to the Supreme Court in banco (*o*). The right of appeal given by the Mining Act of Queensland (*p*) is similar Queensland. to the procedure in New South Wales. In South Australia South Australia. the appeal from the Warden is to the Local Court of Full Jurisdiction (*q*); and in Tasmania, where the old title of Tasmania. Commissioner of the Goldfields is retained in lieu of the title of Warden, the appeal is to the Supreme Court (*r*).

(*k*) 37 Vic. No. 13 (N.S.W.), sec. 67, *et seq.*

(*l*) *Ibid.*, sec. 106.

(*m*) *Ibid.*, sec. 115.

(*n*) 62 Vic. No. 28 (N.Z.), sec. 281, *et seq.*

(*o*) 59 Vic. No. 40 (W.A.), sec.

86; 62 Vic. No. 16 (W.A.), sec. 22.

(*p*) 62 Vic. No. 24 (Q.), Part IX, Div. VI, VII.

(*q*) 56 & 57 Vic. No. 587 (S.A.), sec. 25.

(*r*) 57 Vic. No. 24 (Tas.), sec. 161.

CHAPTER II.

WARDENS OF THE GOLDFIELDS.

SEC. I.—THE OFFICE OF WARDEN.

SEC. II.—JURISDICTION OF THE WARDEN.

SEC. III.—PROCEDURE AND PRACTICE BEFORE THE WARDEN.

(a) Summons.

(b) Parties.

(c) Service of Summons.

(d) Amendment.

(e) Hearing.

(f) Decision and order of the Warden.

(g) Enforcing decision.

(h) Costs.

SEC. IV.—THE WARDEN AND ASSESSORS.

SEC. V.—SPECIAL POWERS OF THE WARDEN.

SECTION I.—THE OFFICE OF WARDEN.

WARDENS of the goldfields, colloquially designated Wardens, are appointed in the same manner as justices of the peace, and within the limits of the district for which they are appointed have and exercise the jurisdiction conferred on them by the Act (a). The appointment is not to be questioned; the presumption is that a Warden exercising his official duties in a district has been properly appointed (b).

The jurisdiction of the Warden will be considered in the next following section. At the present time the police

(a) Act No. 1120, sec. 215.

(b) *Mathers v. Ellery*, 1 Q.L.J. 129 (1883).

magistrates occupy the position of Wardens in their respective districts, and the office of Warden is not now, as formerly, a separate appointment. The offices, though distinct, are analogous; and there is no sound distinction between the offices of police magistrates and wardens as to reviewing decisions, or giving notice of an application for *certiorari* (c). *Bk. IV. Ch. II.
Sec. I.*

The Warden's tribunal is not strictly speaking a court, and the Act No. 1120 does not anywhere apply the term "court" to the place and manner of a Warden's judicial acts (d), although the expression "Warden's Court" was used in the Act No. 446. Though it is usually spoken of as the Warden's Court, complaints should be made as before a Warden of the goldfields, and not as in the Warden's Court. The Warden's
tribunal.

Though the present practice is for the sake of convenience to make process returnable before the Warden at some building occupied and used as a Court house, and though the tribunal is almost invariably spoken of as the Warden's Court, there is nothing in the *Mines Acts* to infer that there is any authority for so doing. In Queensland, where the Warden holds a Court, a Warden when located has all the powers of a Warden without the necessity of a Warden's Court being proclaimed in the district (e). The early practice of the Warden visiting the claim subject of dispute, hearing evidence and deciding the matter on the spot, is still countenanced theoretically by the Victorian Act, and the Warden can adjudicate anywhere within his district. Where held.

The Warden is required to have an office, but this is chiefly for the convenience of suitors, and for the purposes of the leasing regulations; the Warden's office named in the regulations being the place where he issues his summonses and orders, and not the Court or place where he sits and acts as judge (f). Warden's office.

(c) *Reg. v. Carr*, 6 W.W. & A'B. (L.) 240; N.C. 59 (1869).

(d) *In re Clerk*, 2 V.R. (M.) 11; 2 A.J.R. 48 (1871).

(e) *Mathers v. Ellery*, 1 Q.L.J. 129 (1883).

(f) *Constable v. Pigtail Q.M. Co.*, 3 V.L.R. (M.) 7 (1872).

Bk. IV. Ch. II.
Sec. 1.
 Jurisdiction
 generally.

In its general policy the jurisdiction given to the Warden by section 135 of the Act No. 1120, seems to provide for the decision of all disputes between mining people (*g*), and the range of the Warden's jurisdiction is of even greater extent than that of the original jurisdiction of the Court of Mines, which, however, still retains an inherent right to hear appeals from the decision of the Warden, or of the Warden and assessors, on any subject.

On footing with
 courts of petty
 sessions.

The Warden's Court, to employ the popular phrase, is intended to be a court of quick action between parties often unrepresented by counsel or attorney (*h*), and as such may be placed on an equal footing with courts of petty sessions. But though his jurisdiction is restricted, the Warden is often required to deal with cases involving rights to property of large value, and to give decisions which bind those rights (*i*), so that though his tribunal is in a measure on a level with a court of petty sessions, his jurisdiction is relatively far more extended, and embraces far more subtle questions than that of the justices. Subject to the rules of procedure he controls the practice of his court, and the Supreme Court will not interfere with the Warden in such practice; if he violates a rule of practice it may be a fair ground for a rehearing, but prohibition will not lie (*j*).

Duties of
 Warden.

The duty of a Warden may be regarded as judicial rather than ministerial, but section 203 of the Act No. 1120, authorising the Court of Mines to compel officers to perform the duties of their office, classes a Warden with other officers in such a way as to show that that section applies only to the enforcing of his ministerial acts (*k*).

Mandamus.

The Supreme Court will compel the Warden to act if he refuses to perform his duty, and where his duty is judicial and not merely ministerial, a writ of *mandamus* is the

(*g*) *Trahair v. Rocky Mountains Extended Sluicing Co.*, 11 V.L.R. 281 (1885).

(*h*) *Constable v. Smith*, 6 W.W. & A'B. (M.) 58; N.C. 79 (1869).

(*i*) *Mulcahy v. Walthalla Co.*, 5

W.W. & A'B. (E.) 103 (1868).

(*j*) *Ex parte Moor*, 7 W.N. (N.S.W.) 136 (1891).

(*k*) *Reg. v. Strutt, ex parte Lawlor*, 3 V.L.R. (L.) 2 (1877); under Act No. 291, sec. 166.

proper remedy (*l*). But it is not the duty of the Warden in Queensland (*m*) acting ministerially to register a claim for a greater area than that allowed by the regulations, and if acting judicially, it would be his duty to refuse to register such claim at all (*n*). The issue of a writ of execution or warrant of distress is a judicial act, and an action for damages will not lie against the Warden for refusing to issue such writ or warrant (*o*). And where a Warden simply obeys an order of a superior officer, *mandamus* will not be granted against him, on the principle that an inferior ministerial officer will not be compelled to obey a power which he is unable to resist (*p*). But *mandamus* will lie to compel the Warden to perform his duties (*q*) as to receiving, recording and reporting on applications for leases (*r*); and *mandamus* was also granted to compel the Warden to inspect a register of leases, which he had refused to do (*s*); though *mandamus* was refused where the Warden declined to put parties in possession of a claim under a decree of the Court of Mines, in which decree there was an error of description, as an application might be made to the judge of the Court of Mines to rectify the error; for if the Warden feels a difficulty on a question of fact, which can be set right by a party himself, he is not to be harassed by a *mandamus*, which does nothing to solve that difficulty; a party cannot correct his own error at the Warden's expense (*t*).

SECTION II.—JURISDICTION OF THE WARDEN.

In addition to the jurisdiction conferred on the Warden with respect to the several matters mentioned in section 135

General
jurisdiction.

(*l*) *Ibid.* So under Act No. 1120, sec. 267.

(*m*) Under 38 Vic. No. 11 (Q.), Reg. 54

(*n*) *Reg. v. Cribb*, 2 Q.L.J. 157 (1886).

(*o*) *Lynch v. Wood*, Mac. (N.Z.) 179 (1868); see *Inch v. Sellheim*, Brisbane *Week* (Q.), Nov. 18, 1882.

(*p*) *Davenport's case* (Q.), unre-

ported (1867).

(*q*) 38 Vic. No. 11 (Q.).

(*r*) *Ex parte Mills, in re Mills*, 1 Q.L.J. 1 (1881); see 62 Vic. No. 24 (Q.).

(*s*) *Forwood v. Sellheim*, Brisbane *Week* (Q.), Sept. 9, 1882.

(*t*) *Re Cogdon, ex parte M'Dermott*, 2 W. & W. (L.) 139 (1863).

Bk. IV. Ch. II.
Sec. II.

of the Act No. 1120 (a), he has a further jurisdiction under section 216, as well as certain special powers and duties under the Act (b); and an additional jurisdiction is given to him under the *Land Act* (c), and under Part II of the *Mines Act* 1897 (d) as regards gold-mining on private land and assessment of compensation payable to freeholders and others for land taken for mining purposes (e). But where the subject matter in dispute is not an interest in land, his jurisdiction is limited to entertaining complaints between parties who reside within the district in which he is sitting (f).

Reviewing
decision by
Supreme Court.

The right of appeal from the decision of the Warden will be discussed in a subsequent Chapter. But with regard to reviewing decisions, or application for *certiorari*, the Supreme Court will interfere in a mining case, notwithstanding section 296 of Act No. 1120, where the Warden has acted without jurisdiction (g), though it will not do so where he has jurisdiction (h), and the jurisdiction of the Warden will only be questioned after he has adjudicated (i). Thus, where the Warden dismissed a case on a statement that it was *res judicata*, which statement was untrue, it was held that he had already exercised his jurisdiction, and *mandamus* was refused to compel him to hear the case (j).

Res judicata.

The defence of *res judicata* may be good if raised by a new defendant claiming through one of the former defendants, though ordinarily it would be good only between persons who were parties to the former proceedings, and a

(a) As to jurisdiction of the Warden in the other States, see 56 and 57 Vic. No. 587 (S.A.), secs. 17, 18; 57 Vic. No. 24 (Tas.), sec. 147; 59 Vic. No. 40 (W.A.), sec. 52; 37 Vic. No. 13 (N.S.W.), sec. 69; 62 Vic. No. 24 (Q.), sec. 104; 62 Vic. No. 38 (N.Z.), sec. 254.

(b) Act No. 1120, Part I, Div. 2. Sub. 2 (b).

(c) 54 Vic. No. 1106.

(d) Act No. 1514.

(e) See *ante*, Bk. II, Ch. IV, "GOLD MINING ON PRIVATE LAND."

(f) *Morrison v. Teague*, 17 A.L.T. 87; 1 A.L.R. 74 (1895); General Rules for proceedings before Wardens, Feb. 12, 1891, No. 1.

(g) *Reg. v. Clow, ex parte Oliver*, 5 W.W. & A'B. (L.) 89 (1868).

(h) *Reg. v. Sherard*, Sp. Ct. Vic. Dec. 9, 1867; *Argus*, Dec. 10, 1867.

(i) *Reg. v. Warden at Donnelly's Creek*, 3 A.J.R. 38 (1872).

(j) *Reg. v. Akehurst* (3), Sp. Ct. Vic. Dec. 7, 1868; and see *Harney v. Minister of Mines*, 1 W.A.L.R. 146 (1899).

defendant who is entitled and desires to avail himself of such a defence must prove that the matter in issue on the second summons was determined on the hearing of the first summons; and such a plea cannot be heard and disposed of by the Warden until the complainant has called evidence (*k*).

Bk. IV. Ch. II.
Sec. II.

The jurisdiction conferred on the Warden (*l*) to hear and determine an action for money due on the sale of a residence area is not exclusive, and does not oust the jurisdiction of a small debts court to hear a complaint for the balance of money due (*m*); and the Warden is not deprived of jurisdiction to hear a complaint for balance of money due under a contract because the claim is described as one for improper detention of money due (*n*).

Jurisdiction not exclusive.

It seems that the jurisdiction of the Warden to deal with cases of injury to lands (*o*) where questions of title are involved is limited to lands held under the Mining Acts (*p*).

Question of title.

An objection to the jurisdiction of the Warden may be made at any time before evidence is taken; it is not too late when raised after assessors have been sworn (*q*).

Objection to jurisdiction.

The Warden has jurisdiction in all cases of disputed ownership of claims (*r*); and also in cases arising between the Government and persons claiming under miner's right as regards suits for trespass against officials acting unlawfully on behalf of the Crown, though not against the Queen herself (*s*); and he had jurisdiction under section 77 of the

Disputed ownership.

Trespass by Crown official.

(*k*) *Sawtell v. Gay*, 20 V.L.R. 559; 16 A.L.T. 48 (1894).

(*l*) 38 Vic. No. 11 (Q.).

(*m*) *Lee Gow v. Williams*, 6 Q.L.J. 232 (1895). And section 65 of the Act 37 Vic. No. 13 of New South Wales, which gives the Warden's Court jurisdiction to hear and determine actions for trespass, does not take away the jurisdiction of the Supreme Court to entertain actions for trespass in respect of land held under the Mining Act; see regs. 123, 124, 126; *Lindsay v. Hansen*, (2) 20 N.S.W.L.R. (L.) 43 (1899); compare Act No. 1120,

sec. 216.

(*n*) *Vickers v. Tallandoo G. M. Co.*, 23 V.L.R. 206; 3 A.L.R. 178; 19 A.L.T. 78 (1897).

(*o*) Under the Goldfields Act of New Zealand.

(*p*) *McMillan v. Great Extended Sluicing Co.*, 4 N.Z.L.R.S.C. 377 (1886).

(*q*) *O'Reilly v. Bright District and Smoko G. M. Co.*, 25 V.L.R. 440; 5 A.L.R. 321 (1899).

(*r*) *Longbottom v. White*, 3 W.W. & A'B. (M.) 35 (1866).

(*s*) *Wakeham v. Cobham*, 1 V.R. (M) 34; 1 A.J.R. 93 (1870).

Bk. IV. Ch. II.
Sec. II.
Partnership.

Act No. 32 to hear and determine a complaint by a partner claiming an undivided share in a claim, and to put him in possession, and to decide the question of partnership (*t*).

Trespass to
surface.

The Warden has also jurisdiction to hear a suit for trespass by entering on the surface of land in possession of the complainant as a claim, or under gold-mining lease, and erecting a fence thereon (*u*); section 65 of the Act No. 1120 also extends the jurisdiction to cases where a lease is being applied for, but has not at the time been granted; as also to cases of trespass on a lease after it has been granted. Section 135 (i) of the Act No. 1120 includes all disputes as to Crown land held as a claim or a mining lease; sub-division iii extends to all suits for encroachment and trespass upon such land of which any person shall claim to be in possession for mining purposes, and concerning any unlawful interference therewith or injury thereto, causing damage thereto, and whereby mining shall have been hindered or delayed. The word "and" before "whereby" should be construed "or," so that damage to the land or hindering of mining will be enough; otherwise knocking down a miner's residence on his claim or lease would not be cognisable. Section 65 seems to indicate that all entries upon and interference with leased land after application and before lease shall be cognisable, and it would be inconsistent if such injuries after the lease is granted should not also be cognisable (*v*). He has jurisdiction to adjudge the forfeiture of a residence area for non-payment of a lien, if proceedings are brought under both sections 135 (iii) and 216 of the Act

Residence area.

Excess area.

Infraction of
by-law.

No. 1120 (*w*); and forfeiture of an excess area (*x*) held under miner's right (*y*); and the Warden, being also a justice of the peace, is the proper person to entertain a complaint under section 289 of the Act No. 1120 for infraction of a

(*t*) *Kin Sing v. Won Paw*, 1 W. & W. (L.) 303 (1862); compare Act No. 1120, sec. 216, and the jurisdiction thereby conferred on the Warden in partnership cases.

(*u*) Under Act No. 1120, sec. 135 (i).

(*v*) *Extended Cross Reef Co. v.*

Creaver, 4 A.J.R. 10; (1873) and see Act No. 1120, sec. 70.

(*w*) *Fitzgerald v. Elliott*, 5 A.J.R. 3; see *ante*, Bk. III, Ch. IV, Sec. II, "RESIDENCE AREAS."

(*x*) 30 Vic. No. 32 (N.Z.), sec. 62.

(*y*) *Ching Tong Fong v. Lee Chang*, 1 N.Z.J.R. 139 (1873).

by-law (z); and an allegation in a summons as to violation of a by-law the breach of which involves a penalty does not deprive the Warden of his jurisdiction to award damages to the complainant, but it may if necessary be treated as surplusage (a). Bk. IV, Ch. II.
Sec. II.

In the case of *Wissing v. Finnegan* (b) it was held that the Warden had jurisdiction to declare a gold-mining lease void, and to place a complainant seeking forfeiture of such lease in possession of the land as a claim; and it was subsequently decided that he might entertain a complaint for forfeiture of a gold-mining lease for non-compliance with the labour covenant (c). Forfeiture of lease.

Under the New Zealand Goldfields Act it was held that the Warden had jurisdiction to restrain the improper issuing of an execution out of his own court (d); and to enforce a contract, notwithstanding the provisions of the *Statute of Frauds* had not been complied with (e). He has also jurisdiction to hear a complaint for unlawful interference with, or injury to, a claim (f), whether caused wilfully or by negligence (g); and he had jurisdiction (h) to determine the amount of compensation for surface damage to be paid by the holder of a miner's right to the owner of land entered on by the miner for the purpose of mining thereon (i). But he had no jurisdiction under the New Zealand Mining Act of 1891 to grant an extension of time for lodging a survey Execution.
Contract.
Interference.
Extending time for survey.

(z) *Reg. v. Pohlman, ex parte Nickless*, 5 W.W. & A.B. (L.) 31 (1868).

(a) *Wilson v. Simpson*, 22 V.L.R. 642; 3 A.L.R. 38; 18 A.L.T. 179 (1897).

(b) 3 V.R. (M.) 16; 3 A.J.R. 126 (1872).

(c) *McMillan v. Dillon*, 6 V.L.R. (M.) 15; 1 A.L.T. 203 (1880). But see *ante*, Bk. II, Ch. I, "GOLD MINING LEASES," and the cases *Hutcheson v. Erk*, 3 V.L.R. (M.) 1 (1877); *Constable v. Pigtail Q.M. Co.*, 3 V.L.R. (M.) 7 (1877); *Barwick v. Duchess of Edinburgh Co.*, 8 V.L.R. (E.) 70; 3 A.L.T. 68, 121 (1882); *Ives v.*

Lalor, 13 V.L.R. 941; 9 A.L.T. 98 (1887).

(d) *Great Republic G. M. Co. v. Hussey*, 5 N.Z.L.R. S.C. 126 (1880).

(e) *Doherty v. Atkins*, 1 N.Z.J.R. (N.S.) M.L. 2 (1867).

(f) *Beechworth By-laws*, 36 (i), (ii).

(g) *Wilson v. Simpson*, 22 V.L.R. 642; 3 A.L.R. 38; 18 A.L.T. 179 (1897).

(h) Under repealed Act No. 1202, secs. 5, 6; see Act No. 1514, sec. 74.

(i) *Walsh v. Parslow*, 17 A.L.T. 313 (1896).

Bk. IV. Ch. II. Sec. 11. plan on an application for a special claim (*j*), though he had jurisdiction to do so under the Act of 1896 (*k*).

Want of miner's right.

It being established that possession of a miner's right in force by the complainant is a condition precedent to his right to sue before the Warden (*l*), where some of the complainants have miner's rights and others have none the Warden has jurisdiction to assess damages for trespass as to such complainants alone who hold miners' rights, and to put them in possession (*m*). He has also jurisdiction to hear and determine a suit for abandonment under a by-law without being expressly named in such by-law as the person to adjudicate (*n*); and can declare forfeiture under a by-law which, though repealed, governs the liability to forfeiture (*o*); and he can also entertain a question of the abandonment (*p*) of the defendant's registration of a sluicing claim alleged to be abandoned by him (*q*); and can make an order for payment of past contributions under section 157 of the Act No. 1514 (*r*), in addition to the powers vested in him by that Act (*s*).

Need not be named in by-law.

Sluicing claim.

Drainage fees.

Obstructing sludge channel.

The Warden has also jurisdiction in New Zealand to protect persons likely to be prejudicially affected by an unauthorised obstruction built across a public sludge channel, and to make a peremptory order for its removal, although the proofs of prospective injury fall short of those required in the Supreme Court in ordinary *quia timet* actions (*t*).

Exempted land.

The fact of Crown land being temporarily reserved does not deprive the Warden of his jurisdiction in cases in

(*j*) *M'Cormick v. Dean*, 15 N.Z. L.R. (S.C.) 322 (1897); Act 54 & 55 Vic. No. 33 (N.Z.), sec. 125.

(*k*) *Falvey v. Tregoweth*, 16 N.Z. L.R. (C.A.) 341 (1897).

(*l*) Act No. 1120, sec. 298.

(*m*) *Sea Queen Co. v. Sea Quartz Co.*, 4 A.J.R. 130, 174 (1873); *Critchley v. Graham* (1), 2 W. & W. (L.) 71 (1863).

(*n*) *Longbottom v. White*, 3 W.W. & A'B. (M.) 35 (1866); Act No. 1120, sec. 106 (x).

(*o*) *Reg. v. Clow*, *ex parte Oliver*,

5 W.W. & A'B. (L.) 89 (1868).

(*p*) Castlemaine By-laws, No. III, cl. 8, and By-law No. X.

(*q*) *Harders v. Abbott*, 9 A.L.T. 152 (1887).

(*r*) Part III, Div. 2, "Drainage of Mines"; Act No. 1120, Part III, Div. 2.

(*s*) *Cornish Q.M. Co. v. North Cornish Q. M. Co.*, 9 A.L.T. 152 (1887).

(*t*) *Clarke v. Round Hill G.M. Co.*, 13 N.Z.L.R. 266 (1894).

which such lands were at the time of the reservation held under miner's right (*u*). So, under the New Zealand Act, 41 Vic. No. 42 (*v*). Bk. IV. Ch. II.
Sec. II.

The Warden has jurisdiction to state a special case for the opinion of the Supreme Court on an application made immediately after he has orally declared a reserved judgment, but before he has entered it (*w*). Special case.

The Warden has no power to grant permission to mine on a public road (*x*); nor has he jurisdiction to declare ground forfeited where the *locus in quo* is a street or road, as such land cannot be taken up as a claim (*y*); but he has jurisdiction to hear a complaint for trespass on a public road exempted from occupation, as to which a permit has been given by the local council (*z*). Public roads.

He has not jurisdiction to enter into a question of the property in buildings and erections on a residence area in a complaint for recovery of possession (*a*); nor in Queensland to cancel a tailings area for non-user, except as a ministerial officer by order of the Crown (*b*); nor on cancellation of a residence area (*c*) to delegate the valuation for improvements thereon to arbitrators (*d*); and he has no jurisdiction under Part I of the Act 1120 over a partnership for carrying on mining operations on private land (*e*); nor over a partnership as to land held under lease from the Crown (*f*); nor can he entertain a complaint for damages for forfeiture of shares in a mining company (*g*); nor an action by a liquidator of a company Erections on residence area.

Tailings area.

Partnership

Forfeiture of shares.

(*u*) *Wakeham v. Cobham*, 1 V.R. (M.) 34; 1 A.J.R. 93 (1870).

(*v*) *Turnbull v. Jones*, 3 N.Z.L.R. (S.C.) 456 (1885).

(*w*) *Re Frederick the Great Tribute Co.*, 13 V.L.R. 373; 8 A.L.T. 174; see *Reg. v. Thomson, ex parte Costin*, 4 V.L.R. (L.) 512 (1878); and see *post*, Ch. III, Sec. II (B), "SPECIAL CASE STATED BY THE WARDEN."

(*x*) *House v. Ah Sue*, 2 W. & W. (L.) 41 (1863).

(*y*) *Schonfeldt v. Beel*, 1 V.L.R. (M.) 1 (1875).

(*z*) *Sims v. Demamiel*, 21 V.L.R. 634; 17 A.L.T. 129, 241; 2 A.L.R. 51 (1895-6).

(*a*) *Summers v. Cooper* (3), 7 V. L.R. (L.) 443; 3 A.L.T. 61 (1881).

(*b*) *Dodds v. Parsons*, 8 Q.L.J. (N.C.) 39 (1897); *Smyth v. Missingham*, 8 Q.L.J. (N.C.) 26 (1893).

(*c*) Under 38 Vic. No. 11 (Q.), reg. 32.

(*d*) *Smyth v. Missingham, supra*; Act 38 Vic. No. 11 (Q.).

(*e*) *Pride of the East G.M. Co. v. Wimmer* (2), 5 V.L.R. (M.) 9 (1879); see, however, Act No. 1514, Part II.

(*f*) *Reg. v. Smith*, 3 A.J.R. 22 (1872).

(*g*) *Newey v. Garden Gully United Q.M. Co.*, 5 A.J.R. 116 (1874).

Bk. IV. Ch. 11.
Sec. 11.

Tribute
agreement.

for contribution (*h*); nor a complaint that defendant's share in a co-operative mining company was forfeitable, his jurisdiction limiting him to determining forfeiture of a share in a claim (*i*); nor a complaint for breach of a tribute agreement, where the subject matter is not an interest in land, and where the parties did not reside in his district (*j*).

Trespass on land
not occupied by
complainant.

The jurisdiction of the Warden is confined to cases in which two parties are litigating for the same land, and which they both claim, and consequently he cannot entertain a complaint for trespass to land outside the boundaries of the complainant's claim; in such a case there would be no privity between the parties, and the defendant might be a trespasser as against the Crown, but not as against the complainant (*k*).

Assuming
jurisdiction.

If the Warden erroneously assumes jurisdiction such error is a good ground for appeal (*l*); though where a summons shows excess of jurisdiction, such summons may be amended by striking out so as to conform to the evidence (*m*).

Machinery area.

The Warden has no jurisdiction to put in possession of a machinery area a person who is not the holder of a claim or a water-right; a transferee of a machinery area, not being at the time the holder of a claim, is in illegal occupation of it, and if it be proved that the defendant is in illegal occupation, the Warden can, as against him, put in possession of it the holder of a claim or water-right (*n*).

SECTION III.—PROCEDURE AND PRACTICE BEFORE THE WARDEN.

(a) Summons.

Every proceeding before the Warden under section 216

What must
appear in
summons.

(*h*) *Elmslie v. Mackay*, Brisbane Courier, March 6, 1890.

(*i*) *Boyd v. Hayes*, 18 A.L.T. 80; 2 A.L.R. 229 (1896).

(*j*) *Morrison v. Teague*, 17 A.L.T. 87; 1 A.L.R. 74 (1895).

(*k*) *Rosales v. Rice*, 1 V.R. (M.) 1; 1 A.J.R. 13 (1870). In this case it was also held that the Warden had no jurisdiction in trespass on a resi-

dence area, as a residence area was not land used for mining purposes; but see now Act No. 1120, sec. 135 (iii).

(*l*) *Pride of the East G.M. Co. v. Wimmer* (2), 5 V.L.R. (M.) 9 (1879).

(*m*) *Reg. v. Smith, ex parte Mahoney*, 3 A.J.R. 48 (1872).

(*n*) *Hayes v. Levinson*, 16 V.L.R. 305; 11 A.L.T. 180 (1890).

of the Act No. 1120 must be commenced by summons in the form set forth in the Schedule to the Act (*a*), and the summons should clearly and succinctly set out the nature of the relief sought, and the complainant should state in his summons that he is the holder of a miner's right as the foundation of his title to sue (*b*); for the Warden has no jurisdiction unless the summons states the nature of the complainant's case, and shows the substance of the facts constituting the cause of complaint (*c*); and in a complaint for trespass the complainant must show in his summons (*d*) that he has some title to or interest in the land an injury to which is complained of (*e*).

*Bk. IV. Ch. II.
Sec. III.*

The practice in proceedings before the Warden is regulated by rules made under the Act No. 1120 (*f*).

General rules.

The summons must be issued by the Warden in whose district, or portion of a district, the subject in dispute, if land or an interest in land, lies, or where a sole defendant resides; but if there are several defendants the suit may proceed before the Warden in whose district or portion of a district any of the defendants reside (*g*); and if a party to a suit be a corporation or registered company, the office of such company is substituted for the residences of the individual parties (*h*). The summons must be signed and issued by the Warden, or by the Warden's clerk in the name of the Warden (*i*); but where a summons was signed by the clerk in his own name and not in the name of the Warden, it was held that the objection to such summons would be good if taken before the hearing, but not if taken after appearance and hearing, and *certiorari* was refused (*j*).

Issue of summons.

Venue.

Company.

By whom signed.

(*a*) Act No. 1120, sec. 219. Schedules xxii, xxiii.

(*b*) *Foley v. Norton*, 4 V.L.R. (M.) 13.

(*c*) *Ex parte Long*, 16N.S.W.L.R. (L.) 120; 11 W.N. 184 (1895).

(*d*) Under 37 Vic. No. 13 (N.S.W.), sec. 70.

(*e*) *Ex parte Pearson*, 17 N.S.W. L.R. (L.) 245; 13 W.N. 55 (1896).

(*f*) General Rules for proceeding before Wardens, Feb. 12, 1891. Compare 62 Vic. No. 38 (N.Z.),

sec. 278; 56 & 57 Vic. No. 587 (S.A.), sec. 20; Reg. 266; 37 Vic. No. 13 (N.S.W.), sec. 70; 62 Vic. No. 24 (Q.), Part IX, Div. II; 59 Vic. No. 40 (W.A.), sec. 53.

(*g*) General Rules, No. 1; see *Morrison v. Teague*, 17 A.L.T. 87; 1 A.L.R. 74 (1895).

(*h*) General Rules, No. 26.

(*i*) Act No. 1120, sec. 220.

(*j*) *Reg. v. Strutt*, 4 A.J.R. 147 (1873).

Bk. IV. Ch. II. Sec. III. The summons must also describe the addresses of complainants with such distinctness as will enable the Warden and defendants to serve notices upon the complainants without difficulty (*k*).

Address of parties.

Title of proceedings.

The Warden or the Warden and assessors do not constitute a court, and proceedings should be intituled "before a Warden of the Goldfields" and not "in the Warden's Court"; but in an affidavit intituled "in the Warden's Court at Ballarat" the title was treated as surplusage (*l*).

Vagueness.

It should always be borne in mind in drawing a summons that the Warden cannot grant more than he is asked to grant, and consequently no matter pertinent to the issue should be omitted from it. Thus, a summons before the Warden under *The Regulation of Mines and Machinery Act 1883* (*m*) for injuries sustained was held bad for vagueness in not alleging which provision of the Act had been contravened; though on the summons being amended to give the date of the accident, and to refer to the section relied on, it was held to give jurisdiction to the Warden to hear it (*n*). A summons is rightly drawn if, following the form given in the Schedule, it states the ground upon which the defendant's title to the land is challenged or alleged to be liable to forfeiture. A summons called on the defendant to appear and answer the complaint, but did not say what the complainant wanted or required; he merely said there were certain faults which the defendant had committed. However, he followed the form of summons given in schedule xxii of the Act No. 1120; and it was held that section 219, under which the form is adopted, shows that the defendant may assume that the complainant wants for himself that which the defendant is in possession of. The way in which the word "complaint" is used in the schedule shows that what is intended to be described is the

(*k*) General Rules, No. 2.

(*l*) *In re Clerk*, 2 V.R. (M.) 11; 2 A.J.R. 48 (1871).

(*m*) 47 Vic. No. 783; see Act No. 1514, Part III, Div. 1.

(*n*) *Campbell v. Parker's Extended Q.M. Co.*, 10 V.L.R. (M.) 1 (1884); and see *Hooke v. Burke*, 4 A.J.R. 122 (1873).

defect in the title of the defendant, which enables the complainant to come and ask to have the land taken from the defendant and given to the complainant. It is not so much what the complainant asks to be done, but what he alleges the defendant has done; he is not obliged to state what remedy he requires, but what the defendant has done wrong which gives him the cause of complaint. It certainly would be more convenient that the complainant should state upon the summons what he requires to be done, but it is not essential in the form of summons prescribed by the Act that a complainant state specifically what relief he seeks as a consequence of the imperfections in the title of the person assailed (*o*).

*Bk. IV. Ch. II.
Sec. III.*

A summons claiming possession of land "of which the defendants are in illegal occupation" was held to show jurisdiction in the Warden, but was too vague; the objection to the defendants' title should in some degree be pointed out. If on such a summons the objection be taken, the Warden should hear the objection before the case is opened, and if the complainant should refuse an offer to amend, the Warden should dismiss the summons (*p*). Proceedings in the Warden's Court in New Zealand for the infliction of a penalty should be commenced by information and not by complaint (*q*).

Defect in title
must be shown.

Penalty.

There is nothing in the Act or in the rules framed under it requiring any particularity of description in the summons of the land sought to be recovered, or otherwise subject of dispute, and it is sufficient to describe it as a "claim registered in the books of the mining registrar as defendant's mining tenement." The rules enable a defendant to obtain particulars, which is enough to prevent practical inconvenience from vagueness of description (*r*). The common practice is to describe the land by the number of the claim

Description of
land.

(*o*) *Coates v. South Loch Fyne G.M. Co.* (1), 25 V.L.R. 51; 5 A.L.R. 267; 21 A.L.T. 97 (1899).

(*p*) *Barton v. Band of Hope and Albion Consols* (1), 5 V.L.R. (M.)

18; 1 A.L.T. 30 (1879).

(*q*) *Barrell v. Clayton*, 1 N.Z. J.R. (N.S.) M.L. 46 (1872).

(*r*) *Stephens v. Jolly*, 5 A.J.R. 162 (1874).

Bk. IV. Ch. II. Sec. III. in the books of the mining registrar of the district or division in which it is registered. In cases of encroachment and trespass it is sometimes convenient to annex a plan of the ground to the summons, or the Warden may order a survey and plan to be made showing the extent of the alleged encroachment or trespass (*s*).

Two causes of action.

A summons was held to be good which included two different causes of action, viz. illegal occupation by reason of an original defect in the title, and forfeiture of the claim if the title were held good (*t*). However, a summons claiming to be put in possession of portion only of an entire claim alleged to be forfeited or illegally held should accurately define the portion possession of which is sought; the Warden has power to amend by inserting such accurate definition under section 227 of the Act No. 1120, but if not so amended the summons should be struck out for vagueness and want of description (*u*).

Portion of claim.

Objections.

Objection to the sufficiency of a summons may be taken before the complainant has opened his case (*v*), or to the jurisdiction of the Warden at any time before evidence is taken, and it is not too late to object after assessors are sworn (*w*); but the Warden may amend the summons at any stage of the hearing (*x*).

(b) Parties.

All parties interested must be summoned.

In a complaint seeking to be put in possession of a claim all the shareholders in the claim in dispute who hold miners' rights, or a sufficient number of shareholders to represent them, should be before the Warden (*a*), and it is for the Warden to decide whether one of several defendants who appears sufficiently represents all the parties interested (*b*).

(*s*) Act No. 1120, sec. 234.

(*t*) *Weddell v. Howse* (2), 9 V. L.R. (M.) 13; 4 A.L.T. 179 (1883).

(*u*) *Roscrow v. Webster*, 5 W.W. & A'B. (M.) 64 (1868).

(*v*) *Barton v. Band of Hope and Albion Consols* (1), 5 V.L.R. (M.) 18; 1 A.L.T. 30 (1879).

(*w*) *O'Reilly v. Bright District and Smoko G.M. Co.*, 25 V.L.R. 440; 5 A.L.R. 321 (1899).

(*x*) Act No. 1120, sec. 227.

(*a*) *Critchley v. Graham* (1), 2 W. & W. (L.) 71 (1863).

(*b*) *Reg. v. Clow, ex parte Oliver*, 5 W.W. & A'B. (L.) 89 (1868).

Where a number of miners in separate parties, without concert between the parties, sluiced tailings into two streams the waters of which mingled at a point above the plaintiff's land, which was injured by the tailings, and there was no means of ascertaining to which miner or group of miners any particular injury was due, it was held that all the miners were wrongdoers, and properly made defendants in one action (*c*).

*Bk. IV. Ch. II.
Sec. III.*

The irregularity of describing complainants and defendants in proceedings as "A and party," or "B and party," was held not to be a ground for prohibition (*d*); and in Tasmania, where the whole of the names were not specified in the summons, but given as "A and others," the addition was held to be surplusage and capable of amendment (*e*).

Description of parties.

The Warden may amend the summons by the addition of any person as complainant or defendant (*f*), but he has no jurisdiction to add as a co-defendant the name of a person accidentally present at the hearing of the suit, who did not appear as a party, against his will and in spite of his objection; and an order, if made, will be bad, as common justice demands that some summons, or its equivalent in the form of a notice, should be given to a person who protests against being made a party, before he can be treated as a defendant (*g*).

Adding defendant.

But a complainant may make all parties interested defendants when he does not know whose title will be set up (*h*); and where some of the parties are incapacitated, the Warden should strike them out and confine the proceedings to the proper parties (*i*). But where four men have each distinct claims to one man's ground, though their individual rights may have been directly parallel, they cannot be joined as co-plaintiffs as if the four had a conjoint right in

Where some parties are incapacitated.

(*c*) *Costello v. O'Donnell*, 1 N.Z. L.R.C.A. 105 (1882).

(*d*) *Re Rogers, ex parte Robson*, *Argus*, June 30, 1859.

(*e*) *Karlson v. Harris*, *Hore Dig.* (Tas.), 79 (1896).

(*f*) Act No. 1120, sec. 219.

(*g*) *Reg. v. Sherard, ex parte Fraser*, 5 W.W. & A'B. (L.) 80 (1868).

(*h*) *Moore v. White*, 4 A.J.R. 17 (1873).

(*i*) *Critchley v. Graham* (1), 2 W. & W. (L.) 71 (1863).

Bk. IV. Ch. II. Sec. III. four claims, and the Warden cannot amend the summons by four plaintiffs so as to enable one of them only to sue (*j*).

Persons not sued cannot appear.

A person not named in the summons and not served cannot be heard before the Warden; in a complaint between A and B, a third party C cannot have any right to appear as a party, nor by consequence can he have any right of appeal, or any *locus standi* in the appellate court (*k*); and in New South Wales, as in Victoria, a person has no *locus standi* as a party in the Warden's Court (*l*) unless he holds either a miner's right or a mineral licence (*m*).

Trustees.

There is no general objection to a complainant suing before the Warden without making a person for whom he is trustee a party (*n*); neither is a company a necessary party to a suit for forfeiture and possession of a claim, against the defendants who are trustees for such company, the company not being registered as assignee (*o*); nor is a prior registered owner of a claim a necessary party to a suit, although he may not have been removed from the register (*p*).

Company.

Prior owner.

Assignee and representatives.

An assignee in insolvency, or an executor or administrator, may sue and be sued before the Warden as if he were a party in his own right, and an infant may likewise sue and be sued as if he were of full age (*q*); though in New South Wales (*r*) it was held that an infant could not sue before the Warden except by his next friend, who in default of any other provision might be appointed by the Warden (*s*).

Change of interests during suit.

A complainant should go on with his suit notwithstanding any change of interests, for the transfer of a claim, or of a

(*j*) *Oxley v. Little*, 5 W.W. & A'B. (M.) 14 (1868).

(*k*) *Band of Hope Co. v. Critchley*, 2 W.W. & A'B. (L.) 47 (1865).

(*l*) 37 Vic. No. 13 (N.S.W.).

(*m*) *Duncan v. Fullerton*, 14 N.S. W.L.R. (L.) 308; 10 W.N. 33 (1893); Act No. 1120, sec. 298.

(*n*) *Boud v. Watson*, 4 W.W. & A'B. (M.) 85 (1867).

(*o*) *Jolly v. Stephens*, 5 A.J.R. 169 (1874).

(*p*) *Beavan v. Rigby*, 2 V.L.R. (M.) 7 (1876).

(*q*) Act 1120, sec. 138.

(*r*) Under the Mining Act of 1874 (N.S.W.), sec. 113.

(*s*) *Lucas v. Bourke*, 3 N.S.W.L.R. (L.) 215 (1882).

share in a claim, and the registration of it in the name of a party other than the defendant, or any disposal of any interest or share in such claim, will not in any way affect a suit commenced before such transfer or registration was made (t). Bk. IV. Ch. II.
Sec. III.

(c) **Service of Summons.**

A Warden's summons under section 219 of the Act No. 1120 must be served either personally, or at the dwelling of the defendant upon any person of years of discretion, or at the place of business of the defendant upon his servant or agent there employed, four days before the day of appearance, or at such other time as the Warden may direct, which direction shall be noted at the foot of the summons (a). The Warden cannot shorten the time prescribed by regulations (b) which provide that a summons must be served "eight days before the return day, or such other time as the Warden may direct," though he may extend the time (c). Service on a company registered under Part II of the *Companies Act 1890* (d) may be effected if enclosed in a registered letter addressed to the manager of such company at its registered office, or if left thereat with any person in charge of the same, or if delivered to the manager or clerk personally (e). Mode of service.
Company.

In a proceeding against several defendants for possession of a claim every defendant must be served under the regulations or by substituted service; the Warden cannot determine that a number of defendants served sufficiently represent one defendant who is not served, and an order made against a defendant who is not served will not stand (f); and an order cannot be made against a person in court who was made a co-defendant against his protest, and who had not been served with the summons, though the Warden might Who must be served.

(t) *Thompson v. Begg*, 2 V.R. (M.) L.R. (L.) 245; 13 W.N. 55 (1896).
 1; 2 A.J.R. 34 (1871).
 (a) General Rules, No. 3. (d) 54 Vic. No. 1074.
 (b) 37 Vic. No. 13 (N.S.W.), sec. (e) *Ibid*, sec. 201.
 70, reg. 3. (f) *Reg. v. Heron, ex parte Bryer*,
 (c) *Ex parte Pearson*, 17 N.S.W. 2 V.R. (L.) 155; 2 A.J.R. 110
 (1871).

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have added him as a co-defendant (*g*) and then adjourned the case, which would have been equivalent to giving him notice to attend on the day to which the hearing had been adjourned (*h*); and *certiorari* will be granted to bring up proceedings before the Warden in order to have them quashed for non-service on one of a number of defendants (*i*); but appearance will waive any irregularity as to service (*j*).

Order against
unserved
defendant.

An order made against one defendant who has been served and one who has not is bad as against the unserved defendant, where there is no order for substituted service, and being bad as to him is bad altogether; and an unserved defendant who has not authorised anyone to represent him is not bound by the appearance of the other defendant (*k*).

Dispute as to
sufficiency of
service.

In case of dispute as to sufficiency of service, or if the Warden has any doubt on the matter, he may hear evidence and decide whether such service be good or otherwise, and under special circumstances appearing by affidavit he may order that a defendant not served, or insufficiently served, shall be deemed to be a defendant upon such terms as he may think fit (*l*).

Substituted
service.

Where a defendant cannot after diligent enquiry be found, and cannot from any cause by reasonable exertion be served with the summons, the Warden may, if satisfied of the facts, order that service be effected upon such person in such manner as the Warden by such order shall direct, and may postpone the hearing of the case to allow of such substituted service (*m*). Under the Mining Act of New South Wales (*n*) the Warden may proceed with the hearing of a case in the absence of a defendant if in his opinion

Absent
defendant.

(*g*) Act No. 1120, sec. 219.

(*h*) *Reg. v. Sherard, ex parte Fraser*, 5 W.W. & A'B. (L.) 80 (1868).

(*i*) *Reg. v. Clow, ex parte Oliver*, 5 W.W. & A'B. (L.) 89 (1868).

(*j*) *Reg. v. Strutt*, 4 A.J.R. 147 (1873).

(*k*) *Reg. v. Belcher, ex parte Gilbee*,

4 A.J.R. 80, 110 (1873).

(*l*) General Rules, No. 5; and see *Reg. v. Heron, ex parte Bryer, supra*.

(*m*) Act No. 1120, sec. 221; see also 62 Vic. No. 24 (Q.), sec. 124.

(*n*) 37 Vic. No. 13 (N.S.W.), sec. 70; Rules of Practice, cl. 3.

there has been sufficient substituted service, either in the manner prescribed by the rules or otherwise (o). *Bk. IV. Ch. II. Sec. III.*

An order for substituted service under section 221 of the Act No. 1120 ought to be applied for when the summons is returnable; the Warden has no power to make an order for such service before the return day of the summons. He should adjourn the hearing of the case to admit of service in pursuance of his order (p), as the order can only be made at the hearing (q). Application for order.

The affidavit of service must be endorsed upon or written under a copy of the summons served, showing how service was effected (r). Affidavit of service.

Service of summonses and notices authorised by the rules may be effected by delivering them to the attorneys of the parties (s). Service on Attorney.

(d) Amendment.

The power of amendment of informalities in the summons conferred on the Warden is very wide; no objection may be taken to any summons or complaint for any defect, misnomer or inaccurate description, or for any variance between the summons and the evidence adduced by the complainant, but the summons may be amended by the Warden so that the subject matter in dispute between the parties shall plainly appear (a). Power of amendment.

Thus, in a summons seeking forfeiture of four claims alleged to be amalgamated, but no amalgamation being proved, though the Warden cannot adjudicate on the forfeiture of any one claim and find such one claim forfeited, he can amend the summons by striking out the statement as to amalgamation, and adjudicate accordingly (b); and where, in a complaint for forfeiture which did not Amalgamation.

(o) *Ex parte Kelly*, 19 N.S.W. L.R. (L.) 201 (1898).

(p) *Taylor v. Stubbs*, 6 W.W. & A'B. (M.) 16 (1869).

(q) *Reg. v. Akehurst* (1), 6 W.W. & A'B. (L.) 84 (1869).

(r) General Rules, No. 4, sched. iii.

(s) *Ibid*, No. 15.

(a) Act No. 1120, sec. 227.

(b) *Jolly v. Stephens*, 5 A.J.R. 169 (1874).

By-law not specified.

Bk. IV. Ch. II. Sec. III. show under which by-law the forfeiture was incurred, possession being claimed by reason of non-compliance with the by-laws generally, it was held that if no objection were taken the Warden could adjudicate, and if the objection were taken he could amend (*c*); and he may amend a summons seeking possession of surplus ground by altering it to one seeking a declaration of trespass, and may add co-defendants (*d*). When a summons does not exactly follow the form in the schedule to the Act (*e*) it is the duty of the Warden to amend it so as to bring it into conformity with the schedule; thus the alteration of the time for hearing a summons from 10 a.m., the time mentioned in the form in the schedule, to 9 a.m., is an informality only and may be amended (*f*).

Surplus ground.

Form of summons.

Addition of parties.

Vagueness.

Excess of jurisdiction.

Repealing by-law.

The Warden may also at the hearing amend a summons by the addition of any other persons as complainants or defendants, or otherwise (*g*), or by striking out one or more of the complainants, upon such terms as he may think fit (*h*); and he may amend the vagueness in a summons seeking possession of land "of which the defendants are in illegal occupation" by inserting the objection to the defendant's title (*i*); he can also amend the vagueness in a summons claiming to be put in possession of only portion of an entire claim alleged to be forfeited by defining the portion possession of which is sought (*j*); and excess of jurisdiction appearing on the face of the summons may be amended by striking out the portion of it which does not conform to the evidence (*k*); and where a complaint was made under a by-law passed subsequently to the taking up of a claim, if no objection were taken the complainants were held entitled to prove forfeiture under the by-laws applic-

(*c*) *Hooke v. Burke*, 4 A.J.R. 122 (1873).

(*d*) *Oxley v. Little*, 5 W.W. & A.B. (M.) 14 (1868).

(*e*) Act No. 1120, Sched. xxiii.

(*f*) *Vickers v. Talanuloo G.M. Co.*, 23 V.L.R. 206; 3 A.L.R. 178; 19 A.L.T. 78 (1897).

(*g*) Act No. 1120, sec. 219.

(*h*) *Ibid*, sec. 222.

(*i*) *Barton v. Baul of Hope and Albion Consols* (1), 5 V.L.R. (M.) 18; 1 A.L.T. 30 (1879).

(*j*) *Roscrow v. Webster*, 5 W.W. & A.B. (M.) 64 (1868).

(*k*) *Reg. v. Smith, ex parte Mahoney*, 3 A.J.R. 48 (1872).

able, and the Warden could amend if the objection were taken (*l*). *Bk. IV. Ch. II. Sec. III.*

The Warden has power to amend a summons at any stage of the hearing, and may at his discretion adjourn the hearing of the case on terms as to costs (*m*). Time for amendment.

However, where four men, holding distinct titles to one man's ground, were joined as co-plaintiffs, the Warden was not allowed to amend by changing the summons by four complainants into a summons by one only (*n*), and where an application was made to amend a summons for trespass and encroachment against the plaintiff's partner and two other defendants by changing the complaint to one of ouster and exclusion against all the defendants, it was held that the amendment sought was inconsistent with the summons, and should be refused (*o*). Distinct titles to one claim.
Changing object of suit.

(e) Hearing.

The Warden is required as far as practicable to hear evidence and argument in some court house or office, and not on the land or locality of the subject of dispute; but at his discretion he may hear a complaint and receive evidence and give his decision as to boundaries, &c., on the ground (*a*). He is not bound to hear a complaint in any particular place; all he is required to do is to investigate the matter of the complaint, and in the presence of all the parties interested, or such of them as appear to the Warden sufficiently to represent all the parties interested, or in the absence of any of them who have been duly served but do not appear, to hear, receive and examine evidence, and determine the complaint in a summary way (*b*). Place of hearing.

The usual practice, however, is for the Warden to hear and adjudicate on complaints in a court house or place Usual practice.

(*l*) *Hooke v. Burke*, 4 A.J.R. 122 (1873).

(*m*) Act No. 1120, sec. 227.

(*n*) *Oxley v. Little*, 5 W.W. & A'B. (M.) 14 (1868).

(*o*) *Lindgren v. Halpin*, 3 V.R. (M.) 12; 3 A.J.R. 107 (1872).

(*a*) General Rules, No. 13.

(*b*) Act No. 1120, sec. 219.

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where courts of petty sessions are usually held, and if he consider it necessary he will visit the ground subject matter of dispute, to inspect it or to adjust boundaries.

Miner's right.

The first evidence necessary to be tendered by a complainant is his miner's right, as the foundation of his right to sue (*c*), and it will not be sufficient to produce the mining register showing an entry of the number and date of such miner's right. The books of the mining registrar are evidence to show the existence of a miner's right in a person taking up a claim as his qualification for taking it up, but not for the collateral purpose of showing that he had a miner's right at the time of the injury complained of, so as to entitle him to recover; and a copy of the mining register is evidence under section 83 of the Act No. 1120 of the facts recorded in it, but only if shown that the book in which it is made is directed to be kept by the regulations under section 81 (*d*); otherwise the register itself must be produced for the purpose of proving registration of claims, or other matters requiring registration therein.

Books of mining registrar.

Warden's register.

A Warden's register recording the Warden's decision as to marking out a claim during the pendency of an application for lease is not admissible in subsequent proceedings relative to the same claim between a third party and the defendant in the previous proceedings, in order to prove want of title in the defendant (*e*); and where a parish plan containing certain figures and letters was put in evidence, it was held that another plan was not admissible in evidence for the purpose of explaining what those figures and letters meant (*f*). But where a person has marked out as a claim land held under a gold-mining lease alleged to have expired, the lease may be tendered as evidence against the right of such person to mark out, and the leasehold title of the third

Parish plan.

Lease.

(*c*) Act No. 1120, sec. 298; *Duncan v. Fullerton*, 14 N.S.W.L.R. (L.) 308; 10 W.N. 33 (1893).

(*d*) *Cruise v. Crowley*, 5 W.W. & A'B. (M.) 27 (1868).

(*e*) *Dooley v. King*, 19 A.L.T. 2; 28 V.L.R. 53; 3 A.L.R. 113 (1897).

(*f*) *Clarke v. Coeper*, 10 N.S.W. L.R. (L.) 106; 5 W.N. 125 (1889).

party may be set up to show the invalidity of the marking out (*g*). *Bk. IV. Ch. II. Sec. III.*

And so, where on the hearing of a summons by L in the Warden's Court to restrain trespass by H on her land an order of the Supreme Court, dated previously to the summons before the Warden, made in an action between the same parties, was put in evidence to prove the title of L to the land in question, it was held that the order was rightly received in evidence, and was conclusive evidence of L's title up to that date (*h*). Order of Supreme Court.

It is for the Warden to draw inference of facts from the evidence which he hears, and the Supreme Court will not do so on a special case stated (*i*), though on a mere question of fact, if anything turns upon it, the special case will be remitted to the Warden to have the point settled (*j*), and after the Supreme Court has given an answer to a question, the appellant may then apply to the Warden for a rehearing to produce further evidence (*k*). Inference of facts.

On hearing a complaint for forfeiture, the Warden ought not to act on evidence given before him in another case, such as an enquiry concerning the objections to the granting of a gold-mining lease (*l*). He can only give his decision in conformity with the evidence adduced at the hearing, and upon that evidence determine the case summarily (*m*); and he is not bound by a statement of facts agreed on between one party and other persons not parties to the suit (*n*). Evidence in another case.

Where, on the registration of a claim, a mistake is made as to the time of marking out, the Warden should receive evidence tendered to contradict the statement in the applica- Evidence of mistake.

(*g*) *Cooper v. White*, 4 V.L.R. (M.) 10 (1878).

(*h*) *Lindsay v. Hansen* (2), 20 N.S.W.L.R. (L.) 43.

(*i*) *Clerk v. Wrigley*, 4 W.W. & A'B. (M.) 74 (1867).

(*j*) *Barton v. Band of Hope and Albion Consols* (3), 6 V.L.R. (M.) 1; 1 A.L.T. 145 (1880).

(*k*) *Summers v. Cooper* (2), 5 V.L.R. (M.) 42; 1 A.L.T. 115 (1879).

(*l*) *Constable v. Pigtail Q.M. Co.*, 3 V.L.R. (M.) 7 (1877).

(*m*) Act No. 1120, sec. 219.

(*n*) *No. 1 North Phoenix G.M. Co. v. Phoenix G.M. Co.*, 6 Q.L.J. 307 (1896).

Bk. IV. Ch. II. Sec. III. tion under which the claim was registered, and to explain the error therein as to the time at which possession was taken (*o*).

Special case as to evidence. If the Warden entertains any doubt as to the admissibility of evidence, he may state a special case to the Supreme Court for the opinion of that Court on the matter (*p*).

Construction of Acts. In the construction of Acts of Parliament, general words in a statute, however wide and comprehensive in their literal sense, must be limited to the scope and object of the statute (*q*); and upon a question of construction arising concerning a subsequent statute upon the same branch of law, it is allowable to refer to the repealed statute (*r*).

Nature of defence to be stated. In a complaint before the Warden, after the complainant's case has been stated, and before he has called any witnesses, the Warden may call upon the defendant to state the nature of his defence, and neither party will be allowed to depart from such opening statement or defence without leave of the Warden (*s*). But this rule does not necessarily require a complainant to state his case verbally as to those matters which he ought to have alleged in his summons (*t*).

Adjournment. The Warden has full power to adjourn the hearing of a complaint to any other time or place than those named in the summons (*u*).

Rehearing. He has also power to grant a rehearing of any complaint decided by him, or by assessors before him, as often as he may think fit, and upon such terms as to payment of costs or otherwise as he may decide. A party applying for a rehearing must serve on the opposite party, within seven days from the time the Warden's decision was given, notice that the application will be made at the expiration of two

(*o*) *Greenhill v. Braidley*, 4 V. L.R. (M.) 5 (1878).

(*p*) *Palmer v. Chisholm*, 5 A.J.R. 169 (1874).

(*q*) *In re Flood*, 15 N.S.W.L.R. (L.) 330; 11 W.N. 24 (1894).

(*r*) *In re Baldwin*, 12 N.S.W.L.R.

(L.) 128; 8 W.N. 39 (1891).

(*s*) General Rules, No. 21.

(*t*) *Barton v. Band of Hope and Albion Consols* (1), 5 V.L.R. (M.) 18; 1 A.L.T. 30 (1879).

(*u*) Act No. 1120, sec. 219.

days from the date of service of such notice, or as soon thereafter as the application can be heard; and if the Warden grants the application, he will fix the time and place for the rehearing, and direct notice thereof to be given to the parties (*v*); but a rehearing should not be granted except where the decision is such that justice has not been done, or such as reasonable men ought to have decided (*w*).

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Either party to a suit may previous to or during the hearing of a complaint apply to the Warden to inspect the property in dispute, or the Warden may of his own motion make the inspection, if he consider it proper that he should do so, or he may order a survey to be made, and the costs of such inspection or survey will be costs in the cause (*x*).

Inspection.

(f) Decision and Order of the Warden.

The decision of the Warden is regarded as of such moment that he is required (*a*) to enter a minute of it in the Warden's register, and to make an order in accordance with such decision, and write the same in the register underneath his decision, and this entry, drawn up in accordance with schedule xxvii of the Act No. 1120, is known as the "decision of the Warden."

Duty of Warden.

The decision of the Warden should be such as the evidence adduced will warrant, and there is a clear distinction between the decision and the grounds of the decision (*b*); and unless the decision is recorded as above stated under section 235 it is not binding (*c*); for the decision of the Warden forms the ground-work of an appeal under section 254 (*d*), and if un-reversed is an adjudication of right between the parties (*e*).

Decision of the Warden.

(*v*) Act No. 1120, sec. 236.
 (*w*) *Cooper v. Rutherford*, 8 N. S.W.L.R. (L.) 112; 3 W.N. 142; 4 W.N. 8 (1887).
 (*x*) Act No. 1120, secs. 233, 234; General Rules, No. 12.
 (*a*) Act No. 1120, sec. 235.
 (*b*) *Kirk v. Barr*, 2 W.W. & A'B. (L.) 44 (1865).
 (*c*) *Mulcahy v. Walthalla Co.*, 5

W.W. & A'B. (E.) 103 (1868); on appeal to Privy Council, 40 L.J. P.C. 41; 2 A.J.R. 93; *Sim v. Eddy*, 3 W.W. & A'B. (L.) 21 (1866); *Early v. Barker*, 1 W.W. & A'B. (L.) 32 (1864).
 (*d*) *Reg. v. Brewer and Walthalla Co.*, 4 W.W. & A'B. (L.) 124 (1867).
 (*e*) *Mulcahy v. Walthalla Co.*, *supra*.

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Warden is bound
to adjudicate.

The Warden has no discretionary power to refrain from adjudicating (*f*), and where he makes an order finding for a complainant in a proceeding to obtain possession of a claim, he is bound to put him in possession of it, otherwise the order will be quashed (*g*); and he cannot refrain from enforcing forfeiture under a by-law which provides that a claim may by a competent court be declared forfeited, if the circumstances appear to him sufficient to justify such a decision (*h*); and if a Warden's order imposes conditions it is incomplete if it does not clearly show what the conditions are (*i*).

Where order
good in part and
bad in part.

Where the Warden's order is valid in part and invalid in part, the Supreme Court will quash the invalid part (*j*), and such invalid part must be quashed before the complainant can avail himself of the valid part (*k*); but where an order is made against one defendant who has been served and also against one who has not been served the whole order is bad and will be quashed (*l*).

Certiorari.

A Warden's order may be quashed on *certiorari*, notwithstanding that an appeal to the Court of Mines from the order is pending (*m*), and *certiorari* may issue for non-service on one defendant, although taken away by the Act (*n*). *Certiorari* does not deal with any rights of property; it is merely a mode by which a superior tribunal tells an inferior one to stop (*o*); thus, an order pronounced by the Warden after he has refused to state a special case for the opinion of the Supreme Court is invalid, and so, not being made in accordance with the Act No. 1120, *certiorari*

(*f*) *Reg. v. Strutt, ex parte Constable*, 3 V.L.R. (L.) 186 (1877).

(*g*) *Reg. v. Orme, ex parte Droscher*, 3 V.L.R. (L.) 343 (1877); Act No. 1120, sec. 237.

(*h*) *Lavelor v. Stiggants*, 2 V.L.R. (M.) 17 (1876).

(*i*) *Early v. Barker*, 1 W.W. & A'B. (L.) 32 (1864).

(*j*) *Reg. v. Cogdon, ex parte Hartmann*, 3 A.J.R. 118 (1872).

(*k*) *Sayers v. Jacomb*, 3 V.R. (L.) 132; 3 A.J.R. 66 (1872), quoting

Reg. v. Green, 20 L.J., M.C. 168, and *Reg. v. Robinson*, 17 Q.B. 466.

(*l*) *Reg. v. Belcher, ex parte Gilbee*, 4 A.J.R. 80, 110 (1873); *Reg. v. Heron, ex parte Bryer*, 2 V.R. (L.) 155; 2 A.J.R. 110 (1871).

(*m*) *Reg. v. Orme, ex parte Droscher*, 3 V.L.R. (L.) 343 (1877).

(*n*) Act No. 1120, sec. 296; *Reg. v. Strutt*, 4 A.J.R. 147 (1873).

(*o*) *Sims v. Demamiel*, 21 V.L.R. 634; 2 A.L.R. 51; 17 A.L.T. 129, 241 (1896).

may issue to quash it, notwithstanding section 296 (*p*). The Supreme Court will not, however, interfere with the decision of the Warden when he has jurisdiction to make it (*q*), though it will do so where he has no jurisdiction (*r*). Neither will the Supreme Court interfere when the Warden has heard and determined a case; so, where the Warden heard a complaint as to some defendants, but struck it out as to others on the ground of want of jurisdiction, and determined the case in favour of the complainants as against the other defendants, on application for *mandamus* to compel him to hear the case as against the defendants who had been struck out, it was held that he had exercised his jurisdiction and heard and determined the complaint, and *mandamus* was refused (*s*).

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Mandamus.

The Warden's order, if not appealed against, is conclusive and acts as an estoppel (*t*); and where the Warden in his decision, after the Supreme Court has given an opinion on a question reserved, does not state any finding on fact, but merely makes an order thereon, such order does not thereby lose its effect; and on a fresh summons, the Warden having the identity of the proceedings before him, his decision in a former case is a bar to a second summons (*u*).

Warden's order is conclusive.

The Warden is bound to give judgment in accordance with the opinion of the Supreme Court given on a special case (*v*); and when the Supreme Court makes a direction, the duty of the Warden to enter up his decision in accordance with such direction is of a judicial nature, and *mandamus* will issue to compel the performance of it (*w*). And *mandamus* was allowed to issue in New South Wales

Opinion of Supreme Court.

(*p*) *Reg. v. Thomson, ex parte Costin*, 4 V.L.R. (L.) 512 (1878).

(*q*) *Reg. v. Sherard*, Sp. Ct. Vic., Dec. 9, 1867; *Argus*, Dec. 10, 1867.

(*r*) *Reg. v. Clow, ex parte Oliver*, 5 W.W. & A'B. (L.) 89 (1868).

(*s*) *Reg. v. Gawnt, ex parte Bahlman*, 4 A.J.R. 114 (1873).

(*t*) *Mulcahy v. Walhalla Co.*, 5

W.W. & A'B. (L.) 103 (1868); on appeal to Privy Council, 40 L.J. P.C. 41; 2 A.J.R. 93.

(*u*) *Summers v. Cooper* (2), 5 V.L.R. (L.) 42; 1 A.L.T. 115 (1879).

(*v*) *Reg. v. Strutt, ex parte Constable*, 3 V.L.R. (L.) 186 (1877).

(*w*) *Reg. v. Strutt, ex parte Lawlor*, 3 V.L.R. (L.) 2 (1877).

Bk. IV. Ch. II. Sec. III. against the successor of a Warden who was *functus officio*, and the ex-Warden was ordered to pay the costs (*x*).

Order
improperly
minuted.

Where the record of the Warden's decision was "case dismissed, having been adjudicated on before," these words were held to mean that the case was entertained and dismissed, and not dismissed as not entertained; the words "having been adjudicated on before" were improperly minuted, and were not part of the decision, and being outside the decision were not binding and conclusive on the parties (*y*).

Want of
prosecution.

There is no provision made by the Act for dismissing a suit for want of prosecution; the Warden cannot dismiss a summons where the party taking out the summons does not proceed with the case; he can only strike it out (*z*). And under the Act No. 291 he could not give costs in such a case, though power to do so is conferred on him by the existing Act (*a*). A complainant may, however, at any stage of the proceedings serve notice in writing of his intention to discontinue, and thereupon the defendant may proceed for his costs (*b*).

Discontinuance.

Appeal after
dismissal.

Under the Act No. 32, sec. 84, when the Warden dismissed a complaint, there was no appeal to the Court of Mines (*c*); but otherwise where he had given his decision to the effect that no encroachment had been committed as alleged; in such a case the Court of Mines could make and enforce an order (*d*). The dismissal of a complaint by the Warden as frivolous and vexatious is a decision and appealable (*e*), and *mandamus* was refused (*f*).

(*x*) *Ex parte Dempsey*, 13 W.N. (N.S.W.) 83 (1896).

(*y*) *Sim v. Eddy*, 3 W.W. & A'B. (L.) 21 (1866); decided under Act No. 32, sec. 76; compare Act No. 1120, sec. 235.

(*z*) *Reg. v. Carr*, 6 W.W. & A'B. (L.) 240; N.C. 59.

(*a*) Act No. 1120, sec. 281.

(*b*) General Rules, No. 14.

(*c*) *Wardle v. Evans*, 1 W.W. & A'B. (L.) 188 (1864); *Mullen v. Bray*, 1 W.W. & A'B. (L.) 191

(1860); *Power v. McDermott*, 2 W. & W. (L.) 241 (1863).

(*d*) *Tatham v. McGill*, 2 W.W. & A'B. (L.) 113 (1865); compare Act No. 1120, sec. 254, which provides for appeal, whether the decision be a dismissal of the case or otherwise.

(*e*) 50 Vic. No. 51 (N.Z.), sec. 249.

(*f*) *Rawlins v. Revell*, 11 N.Z. L.R. 380 (1891).

For the purposes of section 266 of the Act No. 1120, as to proceedings on refusal to reserve a special case, an order of the Warden is deemed to be made when he announces his intention to make it, and an application to state a special case on a point of law for the opinion of the Supreme Court made afterwards, and before the order is entered in the register, is too late (*g*). Bk. IV. Ch. II.
Sec. III.
When order made.

Where a husband and his wife are both in possession of ground both may be sued, and if the plaintiff recovers possession the order should be drawn up directing the husband to give up possession, and directing the wife not to withhold possession (*h*). Husband and wife.

(g) Enforcing Decision.

Where by the decision of the Warden or the Warden and assessors any sum of money is awarded by way of debt, damages, costs, or otherwise, the order may be enforced by warrant of execution directed by the Warden to the Bailiff of the Court of Mines (*a*). Under the New Zealand Mining Act *mandamus* would lie to compel the Warden to issue execution upon an unsatisfied judgment pronounced and recorded by a predecessor in office (*b*). The Warden may withhold the issuing of the warrant until after the expiration of three days from the day on which the decision was made, if he consider it just and reasonable to do so (*c*). Where, however, the Warden has jurisdiction to hear a case, but makes an order granting relief which he has no power to grant, prohibition will lie to restrain him from enforcing such order (*d*). Order for payment of money.

Where the Warden's decision and order is an order other than for payment of money the person entitled to the Order other than for payment of money.

(*g*) *Reg. v. Thomson, ex parte Costin*, 4 V.L.R. (L.) 512; see *Hancock v. Vanderstoel*, 17 V.L.R. 671 (1891); and see *post*, Ch. IV, Sec. III (*b*), "SPECIAL CASE STATED BY THE WARDEN."

(*h*) *Fitzgerald v. Elliott*, 5 A.J.R. 3 (1874).

(*a*) Act No. 1120, sec. 242.

(*b*) *Reg. v. Wood*, Mac. (N.Z.) 553 (1867). So, under No. 1120, sec. 242.

(*c*) Act No. 1120, sec. 242.

(*d*) *Reg. v. Cusack*, 8 Q.L.J. (N. C.) 32 (1891).

Bk. IV. Ch. II. Sec. III. benefit of such order may on disobedience of the order obtain a summons from the Warden requiring the party so disobeying the order to appear and show cause why he should not be committed to prison for disobedience of such order. On return of the summons the Warden will enquire into the matter, and may, if he think fit, order such party to be committed to prison (*e*). The order of commitment, if warranted by special circumstances, may be made *ex parte* and without notice, on affidavit only of the wilful disobedience of the Warden's order (*f*).

Attachment.

Prisoner may be discharged.

A person so committed may be discharged from custody on such conditions as to performance of so much of the Warden's order as remains to be, and is capable of being, performed as the Warden or a judge of the Court of Mines may direct (*g*).

Certificate to Court of Mines.

A certificate in the form of Schedule xxx to the Act may be obtained from the Warden whenever an award for payment of money remains unsatisfied, which certificate may be filed with the clerk of the Court of Mines for the district, and the Warden's order may be thereupon enforced by execution issued out of that court as upon a decree or order of the Court of Mines (*h*).

(h) Costs.

Scale of costs.

Costs and fees in proceedings before the Warden are fixed by a scale of costs in the schedule to the rules (*a*) according to the amount of money or value of property claimed or recovered (*b*). Where the complainant recovers a demand of less value than twenty pounds the costs are in the discretion of the Warden, but must not exceed the amount allowed by the scale (*c*). A taxation of costs in a lump sum

(*e*) Act No. 1120, sec. 249. This section refers to orders made under any of the four next preceding sections, but the power of enforcing any order, not being for payment of money, under sec. 249 is given by sec. 242; see also 62 Vic. No. 38 (N.Z.), sec. 275.

(*f*) Act No. 1120, sec. 251.

(*g*) *Ibid.*, sec. 250.

(*h*) *Ibid.*, sec. 252.

(*a*) General Rules, Sched. I.

(*b*) General Rules, Nos. 23, 24, 25.

(*c*) *Ibid.*, No. 26.

by the Warden without reference to items, or to any scale of costs, may be good, provided the amount does not exceed what would be allowed item by item under the scale (*d*). Blk. IV. Ch. II. Sec. III.

An agent, not being a barrister or solicitor, appearing before the Warden in New South Wales on behalf of a party is not entitled to costs (*e*). Agent.

Where a complaint is struck out for want of jurisdiction the Warden has power to award costs in the same manner and to the same extent as if he had jurisdiction in the matter of such complaint and the complainant had not appeared, or had appeared and failed to prove his case (*f*). Where complaint struck out.

Costs and expenses to surveyors, accountants, engineers, and other scientific persons whose assistance is obtained by the Warden under sections 233 and 234, are fixed by him in his discretion, and are payable as part of the costs of inspection recoverable (*g*). Surveyors, &c.

Costs of *ex parte* and interlocutory proceedings, applications for rehearing, applications for injunction, inspection, &c., are discretionary with the Warden, provided they do not exceed the costs fixed by the scale (*h*). Interlocutory proceedings.

Costs of suits are also in the discretion of the Warden, and he may, if he awards costs, give them as between party and party or as between solicitor and client (*i*). He is to tax the costs himself at the hearing, and cannot make an order directing them to be fixed by his clerk (*j*). In default of any special direction each party must pay his own costs. Clients may also procure taxation of bills of costs and counsel's fees, by summons before the Warden (*k*). Fees to counsel and attorneys and court fees are fixed by Taxation of costs.

(*d*) *In re Strutt, ex parte Lawlor*, 3 V.L.R. (L.) 1 (1877); Act No. 1120, sec. 280.

(*e*) *Surplice v. Broken Hill Junction S.M. Co., ex parte Surplice*, 3 W.N. (N.S.W.) 137 (1887).

(*f*) Act No. 1120, sec. 281.

(*g*) General Rules, No. 12.

(*h*) *Ibid*; Schedule 1.

(*i*) Act No. 1120, sec. 280.

(*j*) *Coates v. South Loch Fyne G.M. Co.* (3), 26 V.L.R. 117 (1900).

(*k*) Act No. 1120, sec. 279.

Bk. IV. Ch. II. Sec. III. the scale in the schedule to the rules, and are costs in the suit, unless otherwise ordered by the Warden (*l*).

Proceeding in Court of Mines.

If a person elects to proceed in the Court of Mines in the first instance, and does not recover more than one hundred pounds in a demand in respect of a debt or contract, he is entitled only to the costs he would have recovered had he proceeded before the Warden (*m*).

Costs on commitment.

A person committed and in custody for disobedience of an order other than for payment of money must in addition to purging himself of his disobedience pay all costs subsequent to the Warden's order, including the costs of obtaining the commitment (*n*).

Application for lease.

In an application for lease, the deposit money lodged by the applicant with the Warden is subject to any order which the Minister or the Warden may make for payment of costs to the Crown, or the objectors, or any other person; as is also the deposit money lodged by an objector (*o*).

Recovery of costs.

Costs in suits before the Warden are recoverable in the same manner as money awarded by way of debt or damages by the decision and order of the Warden (*p*).

SECTION IV.—THE WARDEN AND ASSESSORS.

Roll of assessors.

The roll of Warden's assessors comprises holders of miners' rights or business licences residing within the district of the Warden's jurisdiction, and are chosen by the Warden; and any party to a suit may require the complaint to be heard before the Warden and four assessors, who virtually form a jury of practical miners (*a*). Where the Warden in Queensland refused to swear assessors *mandamus* was granted to

(*l*) Act No. 1120, sec. 278.

(*m*) *Ibid*, sec. 218.

(*n*) *Ibid*, sec. 250.

(*o*) Leasing Regulations, cl. 43,

44.

(*p*) Act No. 1120, sec. 252.

(*a*) *Ibid*, secs. 228, 232.

compel him to do so, but as he had acted judicially and not ministerially an action for damages would not lie (*b*). *Bk. IV. Ch. 11. Sec. IV.*

In a hearing before the Warden and assessors the matter in dispute is settled by the assessors, with the assistance of the Warden on any point of law, and the decision of the majority of assessors has the same force and effect as a decision of the Warden if acting alone would have; but a verdict of assessors not followed by a judgment of the Warden is not admissible as a verdict for any purpose, and is not of any weight as a finding (*c*). Under the New Zealand Goldfields Act of 1867 the assessors had co-ordinate jurisdiction with the Warden to decide questions of law (*d*). It was so in the former local courts in Victoria. Procedure before assessors.

A hearing before the Warden and assessors resembles proceedings on a trial before a judge and jury, the Act proceeding on the principle that the finding of the assessors is to be taken as a finding of a jury on the facts, the Warden directing them on the law; and where the Warden sits with assessors there is no appeal from the finding of the assessors on the facts; the only appeal is from the misdirection or wrong adjudication of the Warden in matters of law; and the only remedy for a mis-finding by the assessors is a new trial (*e*); though if the assessors cannot agree upon a verdict the Warden is required to decide the matter himself, and not to order a fresh trial before another jury of assessors; if, however, the assessors find a verdict, the order should be made as by the Warden on the finding of the assessors (*f*). The remedy against error on the part of assessors is the power of the Warden to grant a re-hearing (*g*). Similar to jury.

(*b*) *Inch v. Sellheim*, Brisbane *Week*, Nov. 18, 1882. As to proceedings before the Warden and assessors in the other States, see 37 Vic. No. 13 (N.S.W.), sec. 93; 62 Vic. No. 24 (Q.), sec. 109; 59 Vic. No. 40 (W.A.), sec. 71; 57 Vic. No. 24 (Tas.), secs. 78, 151; 62 Vic. No. 38 (N.Z.), sec. 256.

(*c*) *Mulcahy v. Walhalla Co.*, 5 W.W. & A'B. (E.) 103 (1868); on

appeal to Privy Council, 40 L.J. P.C. 41; 2 A.J.R. 93.

(*d*) *Grace v. Eager*, 2 N.Z.C.A. 228 (1872).

(*e*) *Reg. v. Brewer and Walhalla Co.*, 4 W.W. & A'B. (L.) 124 (1867). But see *Moore v. White*, *infra*.

(*f*) *Mulcahy v. Walhalla Co.*, *supra*.

(*g*) *Abraham v. Della Ca* (3), 4 A.L.R. 204 (1898).

*Bk. IV. Ch. II.
Sec. IV.*

Appeal from
finding of
assessors.

An appeal lies to the Court of Mines from the decision of the Warden on the finding of assessors in the same manner as if such decision were given by the Warden acting alone, and the appeal is prosecuted by the same procedure. In the case of *Reg. v. Brewer and Walhalla Co., supra*, section 235 of the Act was not noticed, which states that the expression "decision of a Warden" is to be taken to include the decision of assessors (*h*).

Unintelligible
verdict of
assessors.

Where the assessors returned an unintelligible verdict, and the Warden entered up no decision, but called other assessors, who found for the complainant, it was held on *mandamus* to compel the Warden to enter the verdict of the first assessors, that on the first trial there had been no finding, and that the second finding should stand, but that the Warden should have decided the case by his casting vote when the assessors were equally divided, and have entered up the decision accordingly (*i*).

SECTION V.—SPECIAL POWERS OF THE WARDEN.

Special
jurisdiction.

In addition to the jurisdiction conferred on the Warden by sections 135 and 216 of the Act No. 1120, he has certain special powers vested in him which in the administration of justice in regard to practical mining he is frequently called upon to exercise (*a*).

Injunction.

The most important special power vested in the Warden is that of issuing an injunction order to restrain encroachment or trespass upon or interference with any claim whereby the right or title of the applicant for the injunction may be affected (*b*).

Interim
injunction.

He has also the power in cases of the pressing emergency of any particular case to make an *ex parte* order of injunc-

(*h*) *Moore v. White*, 4 A.J.R. 17 (1873); see Act No. 1120, sec. 235.

(*i*) *Daly v. Wallace*, Sp. Ct. Vic., April 9, 1868.

(*a*) Act No. 1120, Part I, Div. 2 (*b*), secs. 243-253.

(*b*) *Ibid*, sec. 245.

tion to be in force for seven days (*e*). These injunction orders, commonly known as interim injunctions, as well as injunction orders under section 245 are temporary and interlocutory, and should be limited to time, but they may be made perpetual on the final order or decree (*d*). *Bk. IV. Ch. II. Sec. V.*

Where an application is made for an injunction order under section 245 of the Act No. 1120, twenty-four hours' notice must be given to the parties interested in opposing the application; and the order may be made on affidavit (*e*). But all persons giving notice of application for the injunction must appear before the Warden in support of it, or he should dismiss it; and *quære* whether he has power to amend by striking out the names of those who do not appear (*f*). *Procedure.*

In drawing up the injunction order it is necessary to show on the face of it the matters necessary to give the Warden jurisdiction to make it, otherwise the order will be invalid, and disobedience of it will not be an offence under section 249 (*g*). The order when made must be served personally on the person to be bound thereby (*h*), or, if the Warden so orders, it may be served by publication in a newspaper or by affixing a copy thereof in some conspicuous place at or near the property in dispute (*i*). *Form of order. Service.*

The Warden has also special power to make an order authorising a surveyor or an experienced miner to enter upon any lease or claim adjoining the claim or lease of the person applying for such order, for the purpose of inspecting the same, and to discover whether encroachment is being committed, the person so appointed to enter and inspect being required first to make a declaration that he will not divulge any information obtained on any such inspection *Inspection.*

(*c*) Act No. 1120, sec. 246.

(*d*) *Keast v. D'Angri*, 4 A.J.R. 61 (1873).

(*e*) *In re Clerk*, 2 V.R. (M.) 11; 2 A.J.R. 48 (1871).

(*f*) *Grant v. Lawlor*, 3 V.L.R.

(M.) 15 (1877).

(*g*) *Spiers v. Whiteside*, 4 W.W. & A'B. (L.) 91 (1867).

(*h*) Act No. 1120, sec. 248.

(*i*) See *ante*, Bk. I, Chap. IV, Sec. III, "INJUNCTION."

Bk. IV. Ch. II. Sec. V. beyond the fact of the encroachment (*j*). And it is essential that such declaration not to divulge shall be made by the person inspecting, and that, as in the case of injunction orders, the Warden's order show on the face of it jurisdiction in the Warden to make it, before disobedience of such order will become an offence under the Act (*k*).

Order to seize auriferous earth.

The Warden is also authorised at the time of making his decision to order the delivery of any auriferous earth in satisfaction or part satisfaction of a debt ordered by him by such decision to be paid, and may cause such auriferous earth to be seized and delivered accordingly (*l*); and he may also order any auriferous earth or gold to be deposited in the name of the Warden, or of any other person, to abide the final decision in the matter of the complaint before him (*m*).

Deposit of gold, &c.

(*j*) Act No. 1120, sec. 244.

(*k*) *Spiers v. Whiteside*, 4 W.W. & A.B. (L.) 91 (1867).

(*l*) Act No. 1120, sec. 243.

(*m*) *Ibid*, sec. 247. As to the

special powers of the Warden with respect to private land, see Act No. 1514, Part II, sub. 9; and *ante*, Bk. II, Ch. IV, "GOLD-MINING ON PRIVATE LAND."

CHAPTER III.

DISTRICT COURTS OF MINES.

SEC. I.—THE COURT OF MINES.

SEC. II.—JURISDICTION OF THE COURT
OF MINES.

SEC. III.—PROCEDURE AND PRACTICE
IN THE COURT OF MINES.

SEC. IV.—INTERLOCUTORY ORDERS.

SEC. V.—APPEAL FROM THE WARDEN.

(a) Basis of Appeal.

(b) Notice of Appeal.

(c) Hearing of Appeal.

SECTION I.—THE COURT OF MINES.

THOUGH the summary proceedings before the Goldfields Commissioners or Wardens were regarded in the earlier days of the colony as sufficient to determine any dispute as to the title or the boundaries of small claims, yet with the progress of the mining industry it was felt that some more responsible tribunal was required admitting of appeal from the Warden's decision, and for settlement of disputes relating to more valuable mining properties, and involving principles of equity which a Warden or Goldfields Commissioner could not be expected to be competent to deal with. Accordingly, Courts of Mines were first created by *The Goldfields Act (a)* in the year 1857.

Bk. IV, Ch. III.
Sec. I.
Creation of
Courts of Mines.

(a) Act No. 32, sec. 14.

Bk. IV. Ch. III.
Sec. I.

Under Act
No. 291.

The Courts of Mines were continued by the Act No. 291, and their jurisdiction and powers considerably enlarged, and further powers were vested in the judges of these courts to make interlocutory, injunction and other orders. Besides being in itself a Court of appeal from the decision of the Warden, the Act gave litigants in the Court of Mines a right of appeal to the Full Court, and the judge had also the power to state a special case for the opinion of the Supreme Court on any question of law arising before him. This Act is consolidated in the Act No. 1120.

Concurrent
jurisdiction
with Supreme
Court.

Titles to claims and leases existed before the passing of the Act No. 291, but were put on a different footing by that Act, which created the present Court of Mines. The Supreme Court has a concurrent jurisdiction with the Courts of Mines as to these titles. It has been exercised in *Mulcahy v. Walhalla Co. (b)*, which was confirmed on appeal to the Privy Council *(c)*, and in various other cases. They are courts of co-ordinate jurisdiction, though of unequal dignity *(d)*, and stand in relation to the Supreme Court on the footing of inferior courts *(e)*.

A court of law
and equity.

The Court of Mines under the Act No. 32 was a Court of Equity pure and simple *(f)*; the present Court of Mines is a court of both law and equity *(g)*. "The Supreme Court" says Barry, J., "does not stand in the same relation to the Courts of Mines as the Courts at Westminster do with regard to the University Courts, and the Admiralty and Ecclesiastical Courts; those courts are guided by peculiar laws; they do not proceed according to the common law of England, and where they come in conflict with the common law, and where they deal with matters not within their jurisdiction, they render themselves amenable to the courts at Westminster. The Court of Mines stands in a different position; it possesses peculiar powers conferred on it by

(b) 5 W.W. & A'B. (E.) 103 (1868).

(c) 40 L.J. P.C. 41; 2 A.J.R. 93.

(d) *Gunn v. Harvey*, 1 V.L.R. (E.) 111 (1875).

(e) *Colonial Bank v. Willan*, 5

A.J.R. 53 (1874).

(f) *Wilson v. Broadfoot*, 1 W. & V. (L.) 214 (1862).

(g) Act No. 1120, sec. 135.

statute, and is governed by the same principles which guide the Supreme Court. The laws of evidence are the same as those of the Supreme Court; the rules for the interpretation of law are the same; and so long as the court acts within the jurisdiction conferred on it by the statute, the Supreme Court will not interfere with it. Of course, where the jurisdiction is exceeded the Supreme Court will interfere" (*h*). But the Court of Mines being a court of record (*i*), an order made by it will not be prohibited on the ground merely that such order does not on its face show jurisdiction (*j*).

*Bk. IV. Ch. III.
Sec. I.*

A Court of Mines is established within and for each mining district, which court is the Court of Mines for that district, and has no jurisdiction beyond its limits, though the judge may sit either in court or in chambers at any place in Victoria, and no judgment, rule, decree or order of any judge can be set aside by reason that the same was made without the territorial limits of the court (*k*).

District Courts
of Mines.

The State of Victoria is divided into seven mining districts, each having its own Court of Mines. The districts are :

Mining districts.

1. BALLARAT, comprising the divisions of Ballarat, Buninyong, Creswick, Smythe's Creek, Blackwood, and Steiglitz. Ballarat.
2. BEECHWORTH, comprising the divisions of Beechworth, Indigo, Yackandandah, Buckland, Goulburn, and Mitta Mitta. Beechworth.
3. SANDHURST, comprising the divisions of Sandhurst (Bendigo), Raywood, Heathcote, Waranga, and Kilmore. Sandhurst.
4. MARYBOROUGH, comprising the divisions of Maryborough, Amherst, Avoca, Dunolly, Tarnagulla, Korong, and St. Arnaud. Maryborough.
5. CASTLEMAINE, comprising the divisions of Castlemaine, Fryer's Creek, Taradale, Tarrengower, Hep-

Castlemaine.

(*h*) *Reg. v. Cope, in re Moore*, 4 A.J.R. 113.

(*i*) Act No. 1120, sec. 115.

(*j*) *Coates v. South Loch Fyne G.M. Co.* (3), 26 V.L.R. 117 (1900).

(*k*) Act No. 1120, sec. 118.

Bk. IV. Ch. III.
Sec. I.

burn, and St. Andrews; and also the building known as the Law Courts, Melbourne.

Ararat.

6. ARARAT, comprising the divisions of Ararat, Pleasant Creek (Stawell), Raglan, and Barkly.

Gippsland.

7. GIPPSLAND, comprising the divisions of Stringer's Creek, Russell's Creek, Omeo, Mitchell River, Crooked River, Jericho, and Donnelly's Creek.

Melbourne.

The building known as the Law Courts, Melbourne, is deemed to be within the mining district of Castlemaine for certain purposes, and to be a place appointed by the Governor-in-Council where a Court of Mines shall be held for such district (*l*).

Mining Boards.

Each of these mining districts has also its own mining board, empowered to make by-laws for its district generally, or for any individual division of such district (*m*).

Equivalent courts in other States.

In New South Wales the Court of Mines is represented by the District Court sitting as a mining appeal court (*n*); in South Australia, by the Local Court of Full Jurisdiction (*o*); in Queensland, by the District Court (*p*); and in New Zealand, by the District Court (*q*), which, in addition to its appellate jurisdiction, has an original jurisdiction concurrent with the Supreme Court. There is no court either in Western Australia or in Tasmania analogous to the Court of Mines.

SECTION II.—JURISDICTION OF THE COURT OF MINES.

Original jurisdiction.

Every Court of Mines has original jurisdiction to hear and determine all suits cognizable by a court of law or by a court of equity concerning any of the matters specified in section 135 of the Act No. 1120 (*a*). Under the Act No. 32,

Under No. 32.

(*l*) Act No. 1514, sec. 167.
(*m*) Act No. 1120, sec. 106.
(*n*) 37 Vic. No. 13 (N.S.W.),
Div. VIII (1).
(*o*) 56 & 57 Vic. No. 587 (S.A.),
sec. 25.
(*p*) 62 Vic. No. 24 (Q.), Part IX,

Div. VII.

(*q*) 62 Vic. No. 38 (N.Z.), sec. 291.
(*a*) As to the jurisdiction of the Court under the Act No. 32, see *Harvey v. Rodda*, 1 W.W. & A'B. (L.) 21 (1864).

sec. 27, the jurisdiction of the Court of Mines was expressly limited to matters cognizable by a court of equity (*b*), but it may under its present constitution determine all suits cognizable by a court of law as well.

*Bk. IV. Ch. III.
Sec. II.*

Where the Court of Mines has acted within its jurisdiction the Supreme Court will not interfere, although it may have acted wrongly (*c*); and where a judge has a statutory discretion to hear an appeal from the Warden or not, the Supreme Court will not grant *mandamus* directing him to exercise his jurisdiction, where he has already in exercise of his statutory discretion refused to do so, however harshly such discretion may have been exercised (*d*); and the Supreme Court, though having a concurrent jurisdiction with the Court of Mines as to titles to claims and leases, will not generally exercise concurrently such jurisdiction in matters within the jurisdiction of the latter court (*e*).

Control of
Supreme Court.

Under both the Acts No. 32 and No. 291 the judge of the Court of Mines had no jurisdiction to decide, outside the territorial limits of his district, a matter otherwise within such limits (*f*), though if the judge, with the consent or at the request of the parties, allowed them to attend him out of the jurisdiction of his court to hear his reasons and conclusions, there was nothing to prevent him, being afterwards within his jurisdiction, from giving his formal order, formally signed, to the proper officer to be duly recorded (*g*). However, section 118 of the Act No. 1120 now empowers a judge to sit in court or in chambers, and make decrees and orders, outside the territorial limits of his district. Thus, when an appeal has been heard by the judge of the Court of Mines, and a case has been stated by him, the final order on the appeal may be made by the judge while sitting outside the

Judge acting
outside limits of
his district.

(*b*) *Wilson v. Broadfoot*, 1 W. & W. (L.) 214 (1862); *Brinkman v. Holstein*, 1 W. & W. (L.) 368 (1862).

(*c*) *Reg. v. Cope, in re Moore*, 4 A.J.R. 113 (1873).

(*d*) *Renwick v. Hyde*, 1 A.L.T. 77 (1879); see Act No. 1120, sec. 281.

(*e*) *Gunn v. Harvey*, 1 V.L.R. (E.) 111 (1875).

(*f*) *James v. Higgans*, 1 W.W. & A'B. (L.) 51 (1864).

(*g*) *Mulcahy v. Walhalla Co.*, 5 W.W. & A'B. (E.) 103 (1868); on appeal to Privy Council, 40 L.J. P.C. 41; 2 A.J.R. 93.

*Bk. IV. Ch. III. territorial limits of the district in which the appeal was
Sec. II. heard (h).*

Where Court of
Mines has not
jurisdiction.

The Court of Mines has no jurisdiction, in a suit between two companies, to order the defendant company to produce for inspection the books of another company not a party to the suit (*i*); nor had it power under *The Insolvency Statute 1865 (j)* to expunge a proof of debt (*k*).

Concurrent
jurisdiction of
other courts.

The jurisdiction conferred by the Act on the Court of Mines does not oust the jurisdiction of other courts otherwise having jurisdiction in the matter in dispute, on the ground that all Her Majesty's courts are open to all Her Majesty's subjects. So the fact that the Act No. 1120 has provided a special remedy for any interference with the possession of land held under miner's right does not oust the jurisdiction of the County Court to entertain an action of trespass in respect of such interference (*l*).

Jurisdiction
under other
Acts.

In addition to the jurisdiction conferred on the Court of Mines by Part I of the Act No. 1120, the Court has also a further jurisdiction conferred on it by the *Companies Act 1890, Part II (m)*, but the jurisdictions exercised by the court under this Act and under the Act No. 1120 are separate and distinct jurisdictions. Thus the Court of Mines exercises two jurisdictions, viz., that given by the *Mines Act* and that given by the *Companies Act*, but each is separate and distinct from the other (*n*). As, however, the matter of the jurisdiction of the Court of Mines under the latter Act does not come within the scope of the present work, the question need not be further discussed. It may, however, be said that whenever by any other Act jurisdiction is conferred on

(*h*) *Coates v. South Loch Fyne G.M. Co.* (3), 26 V.L.R. 117 (1900).

(*i*) *Park Co. v. South Hustler's Reserve Co.* (1), 8 V.L.R. (M.) 37 (1882); (2) 9 V.L.R. (M.) 4; 4 A.L.T. 135 (1883).

(*j*) 28 Vic. No. 273; nor has it under the present Act; see 54 Vic. No. 1102, sec. 109.

(*k*) *Reg. v. Skinner, ex parte Smith*, 2 A.J.R. 107 (1871).

(*l*) *Reg. v. Dunne, ex parte Baillie*, 3 V.R. (L.) 239; 3 A.J.R. 118 (1872); *Lindsay v. Hansen*, 20 N.S.W.L.R. (L.) 43 (1899).

(*m*) 54 Vic. No. 1074.

(*n*) *Reg. v. Bowman, ex parte Willan*, 3 V.R. (L.) 213 (1872).

the Court of Mines, the provisions of the Act No. 1120, if Bk. IV, Ch. III.
Sec. II. applicable, attach as to procedure (o).

The Court of Mines has power on summons to set aside a Irregular
warrant. warrant of execution issued for too much, such a warrant being altogether bad (p).

SECTION III.—PROCEDURE AND PRACTICE IN THE COURT OF MINES.

The proceedings and practice of the Court of Mines are General rules. regulated by the Act No. 1120 (a) and by the rules promulgated under section 120 of that Act (b).

Every suit in the Court of Mines is commenced by a Plaint and
summons. plaint in writing and is prosecuted without written pleadings, unless the leave of the judge be obtained to prosecute such suit with written pleadings (c); and on the plaint is endorsed a summons to appear at the court on the day on which the court shall first sit next after the expiration of fifteen days from the service of the summons (d); *i.e.*, the summons must be served fifteen clear days before the return day (e).

The suit must be commenced in the district and division Venue. where the subject matter of dispute, if land or an interest in land, lies, and where a sole defendant resides, but if there are several defendants the suit may proceed in the district and division in which any of them reside (f).

Every defendant must be served with the plaint and Service of plaint
and summons. summons (g), and the court has power to decide whether

(o) *Colonial Bank v. Willan*, 5 A.J.R. 53 (1874); see on appeal to P.C., 43 L.J.P.C. 39; 30 L.T. 237.

(p) *Sea Quartz Mining Co. v. Sea Queen Q.M. Co.*, 5 A.J.R. 112 (1874).

(a) Part I, Div. 2 (1), secs. 115-269.

(b) General Rules for proceedings in Courts of Mines, Feb. 12, 1891.

(c) Act No. 1120, sec. 139.

(d) *Ibid*, sec. 143.

(e) See *Kilgour v. Flinn*, 5 W.W. & A'B. (M.) 32 (1868); *Ryan v. Callaghan*, 6 W.W. & A'B. (M.) 54; N.C. 23 (1869). These judgments, however, refer to appeals from the Warden.

(f) General Rules, No. 1.

(g) Act No. 1120, sec. 145.

Ek. IV. Ch. III.
Sec. III.

defendants who appear sufficiently represent those who do not appear (*h*). Service may be effected either personally, or at the dwelling of the defendant upon any inmate of years of discretion, or at the place of business of the defendant upon his servant or agent there employed (*i*); and an affidavit of service must be endorsed on or written under a copy of the plaint and summons (*j*).

Suits with
written
pleadings.

In prosecuting a suit with written pleadings by leave of the judge, a practice which is seldom adopted, the mode of procedure is laid down in sections 149-161, 165 and 171 of the Act No. 1120.

Statement in
plaint.

The plaint must set forth as briefly as shall be consistent with clearness a statement of the facts on which the plaintiff relies, divided into paragraphs numbered consecutively, and must conclude with a prayer for relief. A plaint is objectionable which comprises land held under different titles, as being partly held under miner's right and partly under lease, or which makes co-plaintiffs persons who are not interested at all (*k*).

Seal of the
court.

Every summons and every affidavit of service must be sealed with the seal of the court, and erasures and interlineations in an affidavit of service must be initialled, otherwise such an omission is a good ground for dismissing the plaint, and appearance to take the objection is not a waiver (*l*). But section 134, requiring process to be sealed with the seal of the court, refers to a process in a suit, and applies only to something by which the suit is advanced; and a judge's summons to show cause why plaintiff should not be placed on the register of a company was held sufficient though sealed with a wrong seal (*m*).

Appearance to
object.

A solicitor may appear under protest and take objection

(*h*) *Whiteman v. McGallan*, 6 W. & A'B. (M.) 28 (1869); Act No. 1120, sec. 178.

(*i*) General Rules, No. 2.

(*j*) *Ibid*, No. 3.

(*k*) *Australasia Co. v. Wilson*, 4 A.J.R. 18, 63 (1873).

(*l*) General Rules, Nos. 22, 24; *Mitten v. Spargo*, 1 V.R. (M.) 22; 1 A.J.R. 69 (1870).

(*m*) *Murphy v. Cotter and The United Hand and Band Co.* (2), 7 V.L.R. (M.) 16; 3 A.L.T. 17 (1881).

to the plaintiff (*n*), and such appearance will not be deemed a waiver of the objection taken; where, when a case was called on, the defendant's attorney stated that he intended to dispute the regularity of the affidavit of service, and was told by the judge that he could not be recognised unless he appeared, and that by appearing he would waive the objection to a mere irregularity, it was held that he might take the objection without waiving the irregularity. It is important in mining cases that each defendant should have an opportunity of discussing the due service of himself and others, and that the court should have assistance in calling attention to irregularities (*o*).

It is not necessary in order to maintain a suit for forfeiture of a claim that the plaintiff should show that the defendant either is or claims to be in possession of the claim. "By the Act No. 291, sec. 101 (i), (No 1120, sec. 135 (i)), the jurisdiction seems limited to land in which some person other than the plaintiff shall be or shall claim under miner's right to be entitled to be in occupation or possession. This does not mean that no person can be made a defendant who claims no right, &c. Plaintiffs are often at a loss to find who are the real claimants, especially where they are enforcing forfeiture against those who neglect to work and absent themselves from the claim, and they can only feel secure as to their title acquired by summons by serving all those who have possession or any pretence of right" (*p*). But a plaint is bad which joins as co-plaintiffs parties who are not interested at all (*q*).

The judge has power on an appeal from the Warden to order that an appellant's name be struck out from all proceedings in his court, and that all proceedings be set aside as to such appellant, in a case in which he was made a party without his authority or knowledge (*r*).

(*n*) *Taylor v. Stubbs*, 6 W.W. & A'B. (M.) 19 (1869); *Murphy v. Neil*, 6 W.W. & A'B. (M.) 45; N.C. 19 (1869).

(*o*) *Mitten v. Spargo*, *supra*.

(*p*) *Per Molesworth*, Ch. Judge,

in *Thompson v. Begg*, 2 V.R. (M.) 1; 2 A.J.R. 34 (1871).

(*q*) *Australasia Co. v. Wilson*, *supra*.

(*r*) *M'Leod v. Whitfield*, 2 V.R. (M.) 17; 2 A.J.R. 104 (1871).

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Sec. III.*

Amendment as
to parties;

and for
uncertainty;

and misjoinder.

If objection for want of parties be taken in a suit prosecuted with written pleadings, the judge may amend upon terms (*s*). The judge has also power to amend a plaint or answer for uncertainty, obscurity or repugnance (*t*); or if the answer is ineffectual by reason of omission, or erroneous or incongruous statement of fact (*u*). He may also amend in cases of misjoinder (*v*), and such amendment may be made at any stage of the case. Thus, where lessees and tributers sued for encroachment, and the evidence showed that the encroachment was after the letting on tribute, the judge was allowed to amend the plaint by striking out the lessees as plaintiffs, and to make a decree for the tributers (*w*).

Generally.

A general power of amendment is given by sections 168 and 169, but this refers to proceedings originated in the Court of Mines, and not to appeals; the judge cannot amend a form of appeal (*x*). In New Zealand it was held that although the Warden had power to amend a summons, the District Court as a court of appeal had no power to do so (*y*). Before making an amendment the judge should defer the exercise of his discretion until all the facts are disclosed (*z*).

Hearing of suit.

In the case of a suit prosecuted without written pleadings the suit is heard and determined by the court in a summary way, and the defendant may in such a suit obtain any cross relief in connection with the matters stated by the plaint which he could have obtained had a suit been instituted by himself (*a*).

Cross relief.

Assessors.

The court or either party may require the issues and questions of fact to be tried before the court and six assessors, who are to be summoned as before mentioned, and the verdict of a majority of them will be received (*b*). If, how-

(*s*) Act No. 1120, sec. 149.

(*t*) *Ibid*, sec. 156.

(*u*) *Ibid*, sec. 163.

(*v*) *Ibid*, sec. 166; General Rules, No. 12.

(*w*) *Osborne v. Elliott*, 6 W.W. & A'B. (M.) 49; N.C. 20 (1869).

(*x*) *Burch v. Brown*, 7 V.L.R. (M.) 10; 2 A.L.T. 149 (1881).

(*y*) *Sung You v. Koch*, 1 N.Z. J.R. (N.S.) M.L. 55 (1874).

(*z*) *Osborne v. Elliott*, *supra*.

(*a*) Act No. 1120, sec. 160.

(*b*) *Ibid*, secs. 172, 173.

ever, a majority of the assessors fail to agree on a verdict within six hours after the case is left to them they are to be discharged, and another day is to be appointed for a trial, each party bearing his own costs (*c*). Where issues have been settled for trial by assessors the parties should not be allowed in argument to go outside those issues (*d*); and in a case heard before the court and assessors the judge cannot disregard the finding of the assessors, even though they find against his direction (*e*). The procedure before the court and assessors is similar in all respects to that before a judge and jury.

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The judge of a Court of Mines cannot refuse to act as such; where he is vested with authority to hear a case he is bound to exercise that authority when called on, otherwise he might refuse to try cases he did not wish to try. A judge cannot exercise discretion in such cases; he is bound to try the cases over which he has jurisdiction (*f*).

Judge cannot refuse to act.

As soon as convenient after the decree of the court has been pronounced the party in whose favour the decree is made may require the clerk of the court to draw it up, after which it is settled and signed by the judge, and thereupon becomes effective and enforceable by the process of the court (*g*), unless stayed or appealed against (*h*).

Decree.

The Act No. 1120 contemplates only one decree, and when that is drawn up and signed by the judge it is enforceable at once, unless appealed against (*i*); and the Act does not provide for the judge of the Court of Mines making a decree to account (*j*). After the decree is drawn up by the clerk of the court any party objecting to its terms may apply to the judge to settle it, and when settled and signed

Only one decree contemplated.

Settlement of decree.

(*c*) General Rules, No. 18.

(*d*) *Wearne v. Froggatt*, 2 V.L.R. (M.) 1 (1876).

(*e*) *Brinkman v. Holstein*, 1 W. & W. (L.) 368 (1862).

(*f*) *Reg. v. Dunne, ex parte Bailie*, 3 V.R. (L.) 239; 3 A.J.R. 118 (1872).

(*g*) Act No. 1120, sec. 181.

(*h*) As to enforcement of decrees and orders see Act No. 1120, Part I, Div. 2 (1) (*d*).

(*i*) *Reg. v. Rogers*, 5 W.W. & A'B. (L.) 206 (1868).

(*j*) *Albion Co. v. St. George United Co.*, 4 W.W. & A'B. (M.) 37 (1867).

Ek. IV, Ch. III, Sec. III. it becomes effective (*k*); and the decree should be signed by the person who was judge at its date (*l*).

Opinion of
Supreme Court.

The opinion of the Supreme Court is not a decree of the Court of Mines; the decree itself must be drawn up from the opinion and signed by the judge of the latter court (*m*).

Quashing order
varying decree.

Where a decree made by the judge of the Court of Mines was varied by the Chief Judge, and was subsequently quashed on *certiorari*, but the order varying it was not quashed, it was held that the judge of the Court of Mines ought not to refuse to hear the cause on the ground that the decree had not been quashed; the decree is the foundation of subsequent proceedings and the foundation being removed, the superstructure necessarily falls with it; thus, when the decree was quashed all the subsequent proceedings depending on it went with it, and *mandamus* was granted to compel the judge to proceed with the hearing (*n*).

Absent
defendants.

It seems that the power of the judge of the Court of Mines to make a decree reserving the rights of absent defendants should be exercised only on his own doubts as to the justice of the case against them, and not on the objection of other defendants (*o*).

Nonsuit.

A defendant who declines to call evidence, but who chooses to rest on the insufficiency of the proof of the plaintiff's title, and not on the strength of his own title, is not allowed to run the double chance of obtaining a decision in his favor on a point of law and of falling back afterwards on the merits of the case. If a person asks for a nonsuit he is not allowed afterwards to set that nonsuit aside (*p*).

Hearing to be
concluded
before decree
made.

Where the judge by his decree declared that encroach-

(*k*) *Reg. v. Quinlan, ex parte Sampson*, 10 V.L.R. (L.) 102; 6 A.L.T. 8 (1884).

(*l*) *Vallancourt v. O'Rorke* (2), 2 V.R. (M.) 14; 2 A.J.R. 84 (1871); but see now Act No. 1120, sec. 182.

(*m*) *Ex parte Sea Queen Co.*, 5 A.J.R. 77 (1874).

(*n*) *Reg. v. Rogers*, 6 W.W. &

A'B. (L.) 138 (1869).

(*o*) *Mitten v. Spargo*, 1 V.R. (M.) 22; 1 A.J.R. 69 (1870); see also *Kenwood v. Hoskins*, 16 N.S.W. L.R. (L.) 45; 11 W.N. 126 (1895); *Tangyes v. Nelson*, 3 W.N. (N.S.W.) 100 (1887).

(*p*) *Reg. v. Cope, in re Moore*, 4 A.J.R. 113 (1873).

ment had been committed and that accounts should be taken, and on appeal the Chief Judge varied the decree, but only as to the extent of the encroachment, and remitted it to the judge below, who proceeded to take accounts, it was held on motion for prohibition that the judge is not at liberty to take accounts after having made his decree; having made his final decree before the appeal he became *functus officio*, and had no power to take any further proceedings. He must conclude the hearing before making the decree, leaving nothing more to be done than what is purely ministerial, and taking accounts is not a purely ministerial proceeding; it is *quasi* judicial (*q*).

*Bk. IV. Ch. III.
Sec. III.*

Any party to any suit in the Court of Mines, or to any proceeding before the judge, may appeal to the Full Court against the decree or order (*r*), but no appeal will lie from an order of the judge of the Court of Mines setting aside his former decree and directing a new trial (*s*). The judge may also reserve any question of law in the form of a special case (*t*) for the opinion of the Supreme Court, and the judge must make his decree in accordance with such opinion (*u*). But he may not decide a case first, and then state a special case for the opinion of the Supreme Court (*v*) though the hearing of the case must be completed before any such question is stated (*w*).

Appeal to the Full Court.

Special case.

The judge of the Court of Mines may also grant a rehearing or new trial of questions of fact, and may if he think fit require such questions to be tried by assessors (*x*). An order for a new trial, however, is not such an order as concludes the merits, on the principle of following out the policy adopted in the Privy Council that appeal is only allowed where the merits of the case are concluded (*y*).

Rehearing and new trial.

(*q*) *Reg. v. Rogers*, 5 W.W. & A'B. (L.) 206 (1868).

(*r*) Act No. 1120, sec. 210.

(*s*) *Watson v. Morwood*, 3 V.R. (M.) 1; 3 A.J.R. 21 (1872).

(*t*) Act No. 1120, sec. 209.

(*u*) *Ibid*, sec. 268.

(*v*) *Kirk v. Barr*, 2 W.W. & A'B. (L.) 44 (1865), decided under the

Act No. 32, sec. 70; compare Act No. 1120, sec. 209.

(*w*) *Reg. v. Cope, in re Moore*, 4 A.J.R. 113 (1873); *Ex parte Sea Queen Co.*, 5 A.J.R. 77 (1874).

(*x*) Act No. 1120, sec. 207.

(*y*) *Watson v. Morwood*, 3 V.R. (M.) 1; 3 A.J.R. 21 (1872).

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Certiorari.

The power of the Supreme Court to issue a writ of *certiorari* to bring up proceedings of an inferior court has been taken away by section 296 of the Act No. 1120, but the effect of this clause is not absolutely to deprive the Supreme Court of its power to issue a writ of *certiorari* in mining cases, but to control and limit its action on such writ (*z*), which may be issued to bring up proceedings which are invalid as not being properly taken under the Act No. 1120 (*a*).

Review for error.

But though standing on the footing of an inferior court, the Court of Mines has concurrent jurisdiction with the Supreme Court on certain subjects (*b*), and the decision of the Court of Mines cannot be altered or varied by the Supreme Court by way of review for error, or on further discovery of evidence, and pendency of a case in the Court of Mines will stop the jurisdiction of the Supreme Court on the same subject (*c*). But the Supreme Court will grant *mandamus* when satisfied that there will be a failure of justice if it be not granted (*d*), though the Supreme Court will not interfere with an order of the Court of Mines by prohibition where it has exercised its jurisdiction (*e*), even though the order may be bad (*f*). Prohibition may also issue in regard to part only of an order if such part is severable from the other part (*g*).

Mandamus.

Costs.

The judge has a discretionary power to award costs, which are taxed according to the scale in the general rules (*h*), and he may assess and award costs in an interlocutory application (*i*). The judge can give costs in his discretion as between party and party or as between solicitor

(*z*) *Colonial Bank v. Willan*, 5 A.J.R. 53 (1874).

(*a*) *Reg. v. Strutt*, 4 A.J.R. 147 (1873); *Reg. v. Belcher, ex parte Gilbee*, 4 A.J.R. 80, 110 (1873); *Reg. v. Thomson, ex parte Costin*, 4 V.L.R. (L.) 512 (1878).

(*b*) *Gunn v. Harvey*, 1 V.L.R. (E.) 111 (1875).

(*c*) *United Working Miners G.M. Co. v. Prince of Wales Co.* (2), 6 W.W. & A'B. (E.) 8; N.C. 71 (1869).

(*d*) *Reg. v. Rogers*, 6 W.W. & A'B. (L.) 138 (1869).

(*e*) *Reg. v. Cope, in re Moore*, 4 A.J.R. 113 (1873).

(*f*) *Reg. v. Forbes*, A.R., Sept. 18, 1866.

(*g*) *Coates v. South Loch Fyne G. M. Co.* (3), 26 V.L.R. 117 (1900).

(*h*) General Rules, Nos. 29-31.

(*i*) *Watson v. Commercial Bank*, 5 V.L.R. (M.) 36 (1879).

and client, and he is required at the time of the hearing or of giving his decision to tax them (*j*). Where, however, the judge made a decree with costs, but the costs were not fixed at the hearing, but were subsequently taxed by the clerk of the court, it was held that the decree could not be quashed by *certiorari*, but that the proper remedy was by appeal (*k*). It is the duty of the judge at the hearing to tax the costs in any proceeding before him (*l*), and he has no jurisdiction to direct them to be fixed by the clerk of the court; the enforcement of such an order will be prohibited as to the costs (*m*). *Bk. IV. Ch. III. Sec. III.*

The judge may in any case where a court of equity might do so make an order for staying proceedings until security shall have been given for costs (*n*). Security for costs.

SECTION IV.—INTERLOCUTORY ORDERS.

The judge of the Court of Mines is vested with power to make interlocutory and other orders as may seem just, in addition to the jurisdiction conferred on the Court itself. Power vested in judge.

He may grant injunction against encroachment and trespass pending suit, and until the hearing and determination, or pending appeal, or until further order of the judge or of the court (*a*), and generally he has the same powers in suits, appeals and proceedings in the Court of Mines of granting injunction orders as are vested in the Supreme Court or one of its judges (*b*); and the court may issue an injunction in a suit originating before the Warden and transferred to the Court of Mines, without the necessity of a suit being instituted in the latter court (*c*); and in any Injunction.

(*j*) Act No. 1120, sec. 280.

(*k*) *Reg. v. Quinlan, ex parte Sampson*, 10 V.L.R. (L.) 102; 6 A.L.T. 8 (1884).

(*l*) Act No. 1120, sec. 280.

(*m*) *Coates v. South Loch Fyne G.M. Co.* (3), *supra*.

(*n*) Act No. 1120, sec. 180.

(*a*) *Ibid.*, sec. 195.

(*b*) *Ibid.*, sec. 196.

(*c*) *Dennis v. Vivian*, 1 W.W. & A'B. (L.) 201 (1864), decided under Act No. 32, sec. 70; compare Act No. 1120, secs. 207, 209, 263.

Bk. IV. Ch. III. Sec. IV. suit in the Court of Mines the judge may grant an injunction (*d*) against proceeding in any other court (*e*).

Deposit of gold. The judge may also on the application of any party to a suit or appeal make orders for the appointment of a manager, under whose direction any land or claim in dispute may be worked, such manager to be subject to the control of the court (*f*); and may order any gold obtained to be deposited with any person or at any place pending the final determination of the suit (*g*).

Inspection. He may also make orders for the production of documents for inspection relating to any matter in issue in any suit or appeal (*h*), and may in his discretion upon such terms as he shall think just make orders staying further proceedings under the decision of the Warden pending appeal (*i*).

Stay of proceedings.

How orders made.

Orders may be made *ex parte* on affidavit, or, if notice of the application be given to the other side, either on affidavit or oral testimony (*j*).

SECTION V.—APPEAL FROM THE WARDEN.

Right of appeal. Previous to the passing of the *Goldfields Act* (21 Vic. No. 32) no provision was made for appeal from the decision of the Goldfields Commissioner or the local court; that Act, which instituted the office of Warden, first gave a right of appeal from his decision to the Court of Mines, and this right has been since retained, and is established by the present Act.

Conditions of appeal.

Any person desirous of appealing from the decision of the Warden, which includes the decision of the Warden on the

(*d*) Act No. 1120, sec. 197.

(*e*) See *ante*, Bk. I, Ch. IV, Sec. III, "INJUNCTION."

(*f*) Act No. 1120, sec. 198.

(*g*) *Ibid.*, sec. 199.

(*h*) *Ibid.*, sec. 200.

(*i*) *Ibid.*, sec. 201.

(*j*) *Ibid.*, sec. 202. As to the jurisdiction of the judge of the Court of Mines to make interlocutory and miscellaneous orders see Act No. 1120, Part I, Div. 2 (1) (*e*).

finding of assessors, may appeal to the Court of Mines for the district in which the decision was pronounced, at that sitting of such court which next after the expiration of one month (a) from the day of making such decision shall be held nearest to the place at which such decision shall have been made, provided that ten days (b) notice be given to the parties interested in supporting the decision, or such of them as shall represent all the parties interested, stating the intention to appeal, and the grounds of appeal, and the time and place at which such appeal will be heard. If the parties cannot be found on whom to serve the notice, it must be served on the Warden; a deposit of ten pounds must also be made with the clerk of the court to abide the costs of the appeal (c).

*Bk. IV. Ch. III.
Sec. V.*

Where the parties had appealed from the Warden to the District Court in Queensland (d), and had also applied for prohibition to the Supreme Court, the rule *nisi* for prohibition was discharged on the ground that the parties should have exhausted the appeal before coming to the Supreme Court (e).

Prohibition
pending appeal.

When the date of the sitting of the Court of Mines has not been fixed, it will be sufficient if the notice of appeal be "for the next court which after the expiration of one month" shall be held, without naming a date (f); but it is not sufficient when an erroneous date is named in the notice for the sitting of the court (g).

When next
sitting of court
not fixed.

Under section 70 of the Act No. 32 the judge had power to grant only one rehearing of a hearing or an appeal (h),

Rehearing of
appeal.

(a) Act No. 1120, sec. 254; substituted for fifteen days prescribed by Act No. 291, sec. 212.

(b) Act No. 1120, sec. 254; the ten days will be exclusive of the day of making the decision and inclusive of the last day; see *Watson v. Isselt*, 16 V.L.R. 607 (1890).

(c) See Act No. 1120, Part I, Div. 2 (2) (c). As to appeal from the Warden in other States, see *ante* Ch. I, "MINING COURTS OF JUS-

TICE."

(d) Under the Queensland Mining Act, 38 Vic. No. 11.

(e) *Secretary for Public Instruction v. Auld*, *Brisbane Courier*, April 7, 1886.

(f) *Kilgour v. Flinn*, 5 W.W. & A'B. (M.) 32 (1868).

(g) *Ryan v. Callaghan*, 6 W.W. & A'B. (M.) 54; N.C. 23 (1869).

(h) *Dennis v. Vivian*, 1 W.W. & A'B. (L.) 201 (1864).

Bk. IV. Ch. III. Sec. V. but under section 207 of the Act No. 1120 the court or judge may grant a rehearing of a suit or of an appeal as often as such court or judge shall deem proper.

Appeal is
virtually a
rehearing.

An appeal from the decision of the Warden to the Court of Mines is virtually a rehearing of the case before a higher tribunal, as is an appeal from the justices to the Court of General Sessions, and an appellant is therefore not confined to the case as brought before the Warden; he may on the appeal prove another and different case before the Court of Mines, so long as he limits himself to the grounds of appeal stated in his notice (*i*). "Section 210 of the Act No. 1120, providing for appeals from the Court of Mines, provides for the facts being collected and stated in a special case settled by the parties, or, in case of disagreement, by the judge, and this stands in the place of a transmission of evidence, but in the case of appeals from Wardens to the Court of Mines there is no such provision. Further, as to proceedings before the Warden, there is little of pleadings for the complainant showing the case made by him, and none for the defendant; no provision for reducing the evidence to writing; none for any record showing the grounds of the Warden's decision. It seems to me hardly possible, with such defective means of knowing matters before the Warden, to limit those conducting the cases of either party to the course pursued before him. If new evidence cannot be received at every step, a question might be raised whether that offered was offered before the Warden; and so as to every legal argument, and there would often be more difficulty in deciding what was done or said before the Warden than in originally disposing of the case upon the merits" (*j*).

In the other
States.

In all the other States provision is made for appeal from the decision of the Warden or Commissioner, though the procedure varies in each State (*k*).

(*i*) *Constable v. Smith*, 6 W.W. & A'B. (M.) 59 (1869); *Mola v. Williams*, 3 V.R. (M.) 7; 3 A.J.R. 21 (1892).

(*j*) *Per Molesworth, J.*, in *Constable v. Smith*, *supra*.

(*k*) See *ante*, Bk. IV, Ch. I, "MINING COURTS OF JUSTICE."

(a) Basis of Appeal.

Under the Act No. 32 no appeal would lie where the Warden declined to make an order for possession and dismissed the case (a), but by section 254 of the Act No. 1120 provision is made for appeal whether the decision of the Warden be a dismissal of the case or otherwise.

Bk. IV. Ch. III. Sec. V.
Dismissal of case by Warden.

The basis of appeal is the decision of the Warden, and that only, and where the Warden sits with assessors appeal lies from his decision in the same manner as if such decision were given by the Warden sitting alone (b), though there is no appeal from the finding of the assessors on questions of fact; the only remedy for a misfinding of assessors is a new trial (c). But if the finding of the assessors is minuted as the decision of the case, the finding of the assessors and the order made in pursuance of it become the decision and order of the Warden, and appeal will lie (d). Where the question is purely one of the administration of an Act by the Warden, and the matters alleged show at most irregularity only in the exercise of jurisdiction, and not excess of it, the remedy is by appeal and not prohibition (e). No appeal would lie from the decision of the Warden assessing compensation under section 315 of the Act 1120, relating to private property, when the claim for compensation was waived or abandoned (f); this part of the Act has, however, been repealed by the Act No. 1514.

Appeal based on decision of Warden.

Finding of assessors.

Irregularity.

Compensation.

In a case where questions of fact are to be tried by assessors on appeal (g), the judge has the same power of settling such questions as he would have in his original jurisdiction under section 173 (h).

Judge to settle questions of fact.

(a) *Power v. M'Dermott*, 2 W. & W. (L.) 241 (1863).

(b) *Moore v. White*, 4 A.J.R. 17 (1873).

(c) *Reg. v. Brewer and Walkalla Co.*, 4 W.W. & A'B. (L.) 124 (1867).

(d) *Mulcahy v. Walkalla Co.*, 5 W.W. & A'B. (E.) 103 (1868); on appeal to Privy Council, 40 L.J. P.C. 41; 2 A.J.R. 93.

(e) *Howell v. Ross*, 16 N.Z.L.R.

(S.C.) 684 (1898).

(f) *Wheeldon v. Parkin*, 20 V. L.R. 60; 15 A.L.T. 207 (1894). This section has been repealed, and compensation is now assessed on an ordinary complaint before the Warden, whose decision is appealable; Act No. 1514, sec. 77.

(g) Act No. 1120, sec. 262.

(h) *Brennan v. Watson* (1), 3 W. & A'B. (M.) 55 (1866).

Bk. IV. Ch. III
Sec. V.

What may be
subject of
appeal.

The Court of Mines can hear an appeal on a question of the jurisdiction of the Warden, and may reverse the Warden's order if made without jurisdiction (*i*); and appeal will lie to the Court of Mines from the decision of the Warden under section 216 of the No. 1120 in respect of a sum under one hundred pounds claimed as accruing from a joint mining adventure between the complainant and the defendant (*j*).

Where case
dismissed as not
entertained.

Appeal will lie where a complaint has been dismissed as not entertained by the Warden (*k*); under the Act No. 32 unless the case were entertained and dismissed by the Warden there was no appeal (*l*).

Right of appeal.

A right of appeal, therefore, to be given at all must be expressly given (*m*); and so, under a New Zealand Act (*n*) there was no appeal to the District Court from an adverse decision of the Warden on an application for a claim (*o*).

Appeal
practically a
rehearing.

An appeal should be practically a rehearing, as there is no provision for evidence taken, before the Warden being transmitted to the appellate Court of Mines (*p*); it is in effect a continuation of the proceedings before the Warden (*q*), and the appellant is entitled to prove another and a different case to that proved before the Warden, but he should be confined to the grounds stated in his notice of appeal, subject to the relaxation of section 260 of the Act No. 1120 (*r*).

To what court
appeal had.

The appeal must in the first instance be to the Court of Mines for the district within which the decision appealed from was pronounced, held nearest to the place where such decision was made, though the appeal may be heard at any

(*i*) *Pride of the East G.M. Co. v. Wimmer* (2), 5 V.L.R. (M.) 9 (1879).

(*j*) *Pride of the East G.M. Co. v. Wimmer* (1), 4 V.L.R. (M.) 3 (1878).

(*k*) Act No. 1120, sec. 254.

(*l*) *Sim v. Eddy*, 3 W.W. & A'B. (L.) 21.

(*m*) *Barker v. Phillips*, A.R., June 30, 1865.

(*n*) 30 Vic. No. 32 (N.Z.).

(*o*) *Harris v. Labes*, 1 N.Z.J.R. (N.S.) M.L. 10 (1872); see, however, 62 Vic. No. 38 (N.Z.).

(*p*) *Mole v. Williams*, 3 V.R. (M.) 7; 3 A.J.R. 21 (1872).

(*q*) *Bcurke v. Lucas*, 3 N.S.W. L.R. (L.) 215 (1882).

(*r*) *Constable v. Smith*, 6 W.W. & A'B. (M.) 58; N.C. 70 (1869).

place within the district (s); and it may be assumed that “nearest” means as the crow flies (t). *Bk. IV. Ch. III. Sec. V.*

A complainant does not lose his right to proceed with an appeal by assigning his rights in the claim in dispute pending the appeal (u); and it is sufficient if the parties to the proceedings before the Warden are before the appellate court (v). Persons who are summoned but who do not appear before the Warden may appeal (w); but a person who has no right to appear before the Warden as one of the parties interested has no *locus standi* in the appellate court (x). Assignment by complainant.
Non-appearance before Warden.

There is no appeal from an order of commitment under section 188 of the Act No. 1120, as a special remedy is provided by section 193 as a substitute for appeal; but appeal will lie from the Court of Mines to the Supreme Court from an order dismissing a summons for commitment under section 192 (y). Order of commitment.

(b) Notice of Appeal.

The notice of appeal must be in the form given by the Act (a); and it is essential that the notice state (1) the intention to appeal, (2) the grounds of appeal, and (3) the time and place at which the appeal will be heard. The appellant will be confined to the grounds stated in his notice, though not necessarily to the case proved before the Warden (b), and the appeal must be to the court held nearest to the place where the decision appealed from was pronounced, though it need not necessarily be heard at that court (c). What must be stated in notice.

(s) *Vicary v. Row*, 3 W.W. & A'B. (M.) 1 (1866); Act No. 1120, sec. 254.

(t) See *Reg. v. McLachlan*, 3 W.W. & A'B. (L.) 120 (1866).

(u) *Herbert v. Millan*, 6 V.L.R. (M.) 13; 1 A.L.T. 202 (1880).

(v) *Early v. Barker*, 1 W.W. & A'B. (L.) 32 (1864).

(w) *Constable v. Smith*, *supra*.

(x) *Band of Hope Co. v. Critch-*

ley, 2 W.W. & A'B. (L.) 47 (1865); under Act No. 32, secs. 76, 84; compare Act No. 1120, secs. 254, 219.

(y) *Vallancourt v. O'Rorke* (2), 2 V.R. (M.) 14; 2 A.J.R. 84 (1871).

(a) Act No. 1120, Schedule xxxi.

(b) *Constable v. Smith*, 6 W.W. & A'B. (M.) 58; N.C. 70 (1869).

(c) *Vicary v. Row*, 3 W.W. & A'B. (M.) 1 (1866).

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Sec. V.

Time for appeal.

The appeal must be made at that sitting of the court held next after the expiration of one month from the making of the decision (*d*); if the date of the sitting of the Court of Mines is not fixed and publicly announced within the time limited for giving notice of appeal, a party omitting the actual date of the hearing of the appeal from his notice is not thereby deprived of his right to appeal (*e*); but otherwise if an erroneous date is given (*f*).

Service of notice.

The notice of appeal must be served on the parties interested in supporting the decision appealed from, or upon such of them as shall appear to the Court of Mines sufficient to represent all the parties interested, within ten days from the day of making the decision. If no such person can be found upon whom to serve the notice it must be served on the Warden by whom the decision was made (*g*).

Heading of notice.

Notice of appeal must be headed in the mining district in which the decision was made (*h*), but if headed in the wrong division of the district such an error is mere surplusage, and not fatal to the notice, as the title of the Court of Mines appealed to will be sufficient if the district is plainly indicated in the notice (*i*), though the notice will be bad if headed in the court of a mining district which does not exist, and the judge has no power to amend (*j*). Where a notice of appeal from the Warden (*k*) was headed "In the Supreme Court of New Zealand, Northern District," but not stating that the appellate court would sit at Auckland, and not naming any time when the appeal would be heard, it was held to be sufficient as to the description of the place of hearing and as to the time, as no special day had been fixed for the sitting of the court at the time the notice of appeal was given (*l*); and the District Court (*m*) should not refuse

New Zealand.

(*d*) Act No. 1120, sec. 254.

(*e*) *Kilgour v. Flinn*, 5 W.W. & A'B. (M.) 32 (1868).

(*f*) *Ryan v. Callaghan*, 6 W.W. & A'B. (M.) 54; N.C. 23 (1869).

(*g*) Act No. 1120, sec. 254.

(*h*) *Burch v. Brown*, 7 V.L.R. (M.) 10; 2 A.L.T. 149 (1881).

(*i*) *Frayne v. Carr*, 5 W.W. & A'B. (M.) 12 (1868).

(*j*) *Burch v. Brown*, *supra*.

(*k*) 54 & 55 Vic. No. 33 (N.Z.), sec. 287.

(*l*) *Cooper v. Komata G.M. Co.*, 14 N.Z.L.R. 66 (1895).

(*m*) 50 Vic. No. 51 (N.Z.).

to hear an appeal because the notice did not comply with the form in the appendix in stating the nature of the relief sought, so long as it complied with the provisions of the Act (*n*). A notice of appeal (*o*) which does not contain a statement of the decision appealed from, but only the grounds of appeal, is informal (*p*).

Bk. IV. Ch. III. Sec. V.
N. S. Wales.

A notice of appeal headed for trial by assessors and setting out the grounds of the appeal, but not specifying any material question or issue of fact which the appellant requires to be tried by the assessors, is not a sufficient notice of trial by assessors under section 261 of the Act No. 1120 (*q*).

Trial by assessors.

The date of the decision appealed from should be correctly stated in the notice to distinguish it from other decisions in the same suit, and as regulating the time of appealing and the sitting of the court to which the appeal should be made (*r*), and the notice should also describe the decision by both date and place; the heading of the Warden's order containing the name of the place is not sufficient (*s*); but failing to fill up the blank in the schedule form, left for the insertion of the name of the place at which the proceedings had been heard by the Warden, was held not to invalidate the notice of appeal (*t*).

Insertion of decision.

All documents on an appeal from the Warden should be headed as between appellant and respondent, and not as between complainant and defendant (*u*).

Heading of documents.

The judge has no power, after the expiration of the time allowed for appeal, to extend the time (*v*), but the time for notice of appeal and deposit of money may be enlarged by verbal consent of the parties (*w*).

Extension of time for appeal.

- (*n*) *Ward v. Bernston*, 8 N.Z.L.R. 21 (1889).
- (*o*) 37 Vic. No. 13 (N.S.W.).
- (*p*) *Lindsay v. Hanson* (1), 19 N. S.W.L.R. (L.) 348 (1898).
- (*q*) *Brennan v. Watson* (1), 3 W. W. & A'B. (M.) 55 (1866).
- (*r*) *Kilgour v. Flinn*, 5 W.W. & A'B. (M.) 32 (1868).
- (*s*) *Frayne v. Carr*, 5 W.W. &

- A'B. (M.) 12 (1868).
- (*t*) *Rees v. Carroll*, 11 A.L.T. 195 (1890).
- (*u*) *Mole v. Williams*, 3 V.R. (M.) 7; 3 A.J.R. 21 (1872).
- (*v*) *Central Q.M. Co. v. Morgan*, 4 A.J.R. 174 (1873).
- (*w*) *Conway v. Louchard*, 10 V. L.R. (M.) 6; 6 A.L.T. 120 (1884).

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Sec. V.

Sundays and
holidays.

Sundays and holidays must not be excluded from the computation of time for giving notice of appeal; if the last day falls on a Sunday notice of appeal given on Monday is bad (*x*).

Signature of
notice.

Notice of appeal may be good, though not actually signed by the appellants, or as on their behalf (*y*); it is sufficient if their names appear at the foot of the notice (*z*). Thus, a notice of appeal commencing "I, the undersigned," and signed "Thos. Mann, attorney for Wm. Dillon" (the appellant), was held sufficient (*a*). So, where the notice was signed "H. Cock, by his attorney J. R. Hornby," the words being written, not by the attorney, but by his clerk (*b*). But the name of the appellant must appear at the foot of the notice; a signature by an attorney "for and on behalf of the abovenamed appellants" is not sufficient (*c*).

Service of
notice.

Service of notice of appeal cannot be effected on an unauthorised agent of the respondent (*d*), but if either party appear before the Warden by attorney, notice of appeal may be served on such attorney (*e*), though service on an attorney by leaving the notice with an inmate of his private house is not good service. It should be served on him personally, or on a clerk at his office (*f*).

Service on
Warden.

When service of notice on the Warden is resorted to, he must be served within the time limited by section 254 of the Act No. 1120, viz., ten days. Service on him at his residence, or on his clerk at his office, is sufficient (*g*), but not on an inmate of his private residence (*h*).

Substituted
service.

If it be shown to the Warden by affidavit that a person

(*x*) *Reg. v. Macoboy, ex parte Stevens*, 1 V.R. (L.) 26; 1 A.J.R. 37 (1870).

(*y*) *Kilgour v. Flinn*, 5 W.W. & A'B. (M.) 32 (1868); *Melville v. Higgins*, 1 W. & W. (L.) 306 (1862); *Maconochie v. Woods*, 2 W. & W. (L.) 249 (1863).

(*z*) *Frayne v. Carr*, 5 W.W. & A'B. (M.) 12 (1868).

(*a*) *Dillon v. Matthews*, 3 V.L.R. (M.) 5 (1877).

(*b*) *Cock v. Sayers*, 3 A.J.R. 63;

3 V.R. (M.) 10 (1872).

(*c*) *Ryan v. Callaghan*, 6 W.W. & A'B. (M.) 54; N.C. 23 (1869).

(*d*) *Murphy v. Neil*, 6 W.W. & A'B. (M.) 45; N.C. 19 (1869).

(*e*) Act No. 1120, sec. 255.

(*f*) *Lawlor v. Grant and the Pig-tail Co.*, 3 V.L.R. (M.) 12 (1877).

(*g*) *Ward v. McGallan*, 6 W.W. & A'B. (M.) 28 (1869).

(*h*) *Lawlor v. Grant and the Pig-tail Co.*, *supra*.

named as a respondent in a notice of appeal cannot be found, and cannot by reasonable exertion be served with the notice within the time limited, the Warden may make an order for substitution of service on him (*i*). Under the Act No. 32, sec. 84, an order for substituted service of an appeal summons might be made by the judge at the hearing, and it was for the judge to say whether all parties should be served, or such only of them as appeared to him sufficient to represent all (*j*).

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Sec. V.*

Respondents on appeal have the right to object to defective service of notice on themselves or others, and to examine and give evidence upon controverted facts as to service (*k*). The question whether a person served with notice of appeal sufficiently represents all the respondents is a matter for the discretion of the judge, and service of a notice to produce a document at the hearing of the appeal is not a waiver of an objection to the service of the notice of appeal (*l*).

Objections to service.

(c) Hearing of Appeal.

An appeal from the decision of the Warden is heard before the Court of Mines in the same manner as a suit originating in that court, at such sitting of the court or at such other place within the mining district and at such time as the judge shall by writing under his hand direct; and the order on the appeal is final and conclusive on the parties (*a*).

Procedure.

On the hearing of an appeal, after the appellant has stated his case, and before calling witnesses, the judge may call upon the respondent to state the nature of his defence, and neither party will be permitted to depart from his opening statement without leave of the judge (*b*).

Statement of case and defence.

Either party to an appeal may require any question of fact material to the issue to be tried before the court and six assessors, and in such case the court in pronouncing its order must act on the verdict found on such trial; or the

Assessors.

(i) Act No. 1120, sec. 256.

(j) *In re Rogers, ex parte Shean*, 2 W.W. & A.B. (L.) 84 (1865); compare Act No. 1120, sec. 254.

(k) *Murphy v. Neil*, 6 W.W. &

A.B. (M.) 45; N.C. 19 (1869).

(l) *Whiteman v. McGallan*, 6 W.W. & A.B. (M.) 28 (1869).

(a) Act No. 1120, sec. 257.

(b) General Rules, No. 36.

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Sec. V.

judge may on the hearing of the appeal direct an issue to be tried before the court and assessors, but in this case the court is not bound to act on the verdict found in pronouncing its order, but may direct another trial of the issue (c). The party requiring the issue to be tried before assessors must in his notice thereof state what question of fact material to the issue the assessors are required to try. The provisions as to the trial of issues and of questions of fact in original proceedings in the Court of Mines are applicable to the trial of such issues and questions of facts in the case of appeals (d).

Right to begin.

In the case of *Stevens v. Webster* (e) it was held that on an appeal from the Warden to the Court of Mines the appellant should have the right to begin, whether he were complainant or defendant in the court below; but in a later case (f) this ruling was not followed, and it was held that, as an appeal was practically a rehearing (g) the complainant below should begin, though it seems the judge has an absolute discretion as to the order of hearing.

Production of
decision
appealed from.

The production of the Warden's decision, as required by the Act No. 291, sec. 213, was a condition precedent to the hearing of an appeal, and could not be waived; it was not a mere right between the parties, like a notice of appeal (h); but this section has been amended by the Act No. 1120 (i). However, before an appeal can be heard a copy of the complaint before the Warden, and a copy of the Warden's decision which is appealed against, must be delivered to the clerk for the use of the court, or the court must be provided with a copy (j). It need not be certified as a true copy, as the section only requires the appellant to lodge what he represents verbally or otherwise to be a copy of the complaint; but the judge may receive evidence as to its correctness (k). In New South Wales the District Court has no

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- (c) Act No. 1120, sec. 261.
 (d) *Ibid*, sec. 262.
 (e) 3 W.W. & A'B. (M.) 23 (1866).
 (f) *Mole v. Williams*, 3 V.R. (M.) 7; 3 A.J.R. 21 (1872).
 (g) *Constable v. Smith*, 6 W.W. & A'B. (M.) 58; N.C. 70 (1869).
 (h) *Crocker v. Wigg*, 5 W.W. & A'B. (M.) 20 (1868).
 (i) See Act No. 1120, sec. 257.
 (j) *Ibid*, sec. 256.
 (k) *Hok John v. Yung Hing*, 4

jurisdiction (*l*) to hear an appeal from the Warden unless a Bk. IV. Ch. III. Sec. V. certified copy of the Warden's decision is produced; the production of the register containing an entry of the Warden's order, but not of his decision, is not sufficient (*m*). But where a Queensland Act (*n*) required a copy of the Queensland. plaint and notice of defence and of the minutes and decision of the Warden to be produced to the court on the appeal, and the judge had before him a copy of the entry of the grounds of complaint, of the defence, and of the Warden's decision, it was held that the Act had been sufficiently complied with, and the judge was bound to hear the appeal (*o*).

The court may make such order with respect to the costs Costs of appeal. of an appeal and of the proceeding appealed from as it may think fit (*p*); but if the subject matter of appeal shall appear to the court not to exceed in value twenty pounds, no costs of the appeal will be allowed unless the court shall under special circumstances allow them (*q*).

The judge should hear an appeal without reference to any Negotiations for compromise. negotiations for compromise between the parties, arrived at after the decision of the Warden is made (*r*); but an agreement between the parties, prior to the hearing of the complaint, to accept the decision of the Warden as final will bar the appeal (*s*).

If an appeal from the decision of the Warden be dis- Duty of Warden. missed, the Warden may proceed to enforce his decision as if no appeal had been brought; and if the decision be varied on appeal, the decision so varied is deemed to be the decision of the Warden, which may be enforced as an original decision (*t*).

A.J.R. 173. As to the jurisdiction of the court to hear an appeal when a copy of the complaint and decision has not been furnished, see *Renwick v. Hyde*, 1 A.L.T. 77 (1879).

(*l*) 37 Vic. No. 13 (N.S.W.), secs. 78, 106.

(*m*) *Ex parte Lucas*, 8 W.N. (N.S.W.) 33 (1891), following *Crocker v. Wigg*, 5 W.W. & A'B. (M.) 20 (1868), and *Whiteman v. McGellan*, 6 W.W. & A'B. (M.) 28 (1869).

(*n*) 38 Vic. No. 11 (Q.), sec. 47.

(*o*) *Bearup v. Barker*, 3 Q.L.J. 45 (1887).

(*p*) Act No. 1120, sec. 257. The judge cannot order costs of appeal to be fixed by the clerk of the court; *Coates v. South Loch Fyne G.M. Co.* (3), 26 V.L.R. 117 (1900).

(*q*) *Ibid.*, sec. 259.

(*r*) *Harrison v. Smith*, 6 W.W. & A'B. (E.) 182 (1869); see on appeal to P.C., 3 A.J.R. 44.

(*s*) Act No. 1120, sec. 258.

(*t*) *Ibid.*, sec. 269.

CHAPTER IV.

THE APPELLATE MINING COURT.

SEC. I.—THE COURT OF THE CHIEF
JUDGE OF COURTS OF MINES.

SEC. II.—APPEAL FROM THE COURT
OF MINES.

SEC. III.—SPECIAL CASE.

(a) Stated by the Judge of
the Court of Mines.

(b) Stated by the Warden.

SECTION I.—THE COURT OF THE CHIEF JUDGE OF COURTS OF MINES.

Bk. IV. Ch. IV. Sec. I.
Right of appeal. Special case.

THE right of appeal from the Court of Mines to the Supreme Court was first given by *The Goldfields Act* (No. 32), sec. 71, which Act created the first Court of Mines. On the repeal of this Act by *The Mining Statute* 1865 (No. 291) a new appellate court was erected, entitled the Court of the Chief Judge of Courts of Mines, to which court appeal might be had from the Court of Mines (a); and by the same Act the Judge of the Court of Mines was empowered to reserve any question of law in the form of a special case for the opinion of the Chief Judge (b), and a similar power was given to the Warden (c).

(a) Act No. 291, sec. 82.

(b) *Ibid*, sec. 171.

(c) *Ibid*, sec. 194.

The Court of the Chief Judge was a court of record, on the same footing as the Supreme Court, and its officers were the officers of the Supreme Court in its equity jurisdiction, who performed all such duties appertaining to the Court of the Chief Judge as were analogous to the duties performed by them as officers of the Supreme Court in its equity jurisdiction.

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Sec. I.*
The Court of the
Chief Judge.

The Court of the Chief Judge was, however, abolished by *The Judicature Act* 1883 (*d*), and after the coming into operation of that Act (July 1, 1884), the jurisdiction theretofore vested in the Court of the Chief Judge was transferred to the Supreme Court, and, except as to pending business, the Court of the Chief Judge ceased to exist (*e*). The creation of the Court of the Chief Judge did not altogether deprive the Supreme Court of its jurisdiction, the jurisdiction of such court being concurrent with that of the Supreme Court. The Supreme Court was not justified in declining to hear a case simply because the Chief Judge of Courts of Mines had already decided the point of law involved in it; the Legislature in creating a new court, and declaring its decision to be final as between the parties, did not deprive the Supreme Court of its jurisdiction; and the Supreme Court was not concluded by the decision of the Chief Judge of Courts of Mines upon a point of mining law (*f*).

Abolished by
Judicature Act
1883.

Concurrent
jurisdiction
with Supreme
Court.

SECTION II.—APPEAL FROM THE COURT OF MINES.

The right of appeal from any decree or order of the Court of Mines, or from the order of any judge thereof, to the Full Court is given by the Act No. 1120, secs. 210, 265, which provide for the procedure thereon (*a*). The Full Court may hear the appeal and make such order therein as shall be just, and may dismiss the appeal, or reverse or vary

(*d*) 47 Vic. No. 761.
(*e*) *Ibid.*, secs. 4, 5, 6, 7.
(*f*) *McCafferty v. Cummins*, 5 W.W. & A'B. (L.) 73 (1868); *Mulcahy v. Wathalla Co.*, 5 W.W. &

A'B. (E.) 103 (1868).
(*a*) Compare 62 Vic. No. 38 (N.Z.), sec. 292; 62 Vic. No. 24 (Q.), sec. 150; 37 Vic. No. 13 (N.S.W.), sec. 115.

Bk. IV. Ch. IV.
Sec. II. the decree appealed from, or may direct the case to be re-heard before the court, but not before the Court of Mines, and may give costs; and the order of the Full Court is final (*b*).

Appeal case. The appeal to the Full Court is by means of an appeal case in the form agreed on by both parties or their attorneys or counsel, or stated by the judge from whose order, or by the judge of the court from the decree or order of which the appeal shall be brought; if the parties cannot agree upon the case it is settled and signed by the judge, and is transmitted to the Prothonotary and set down to be argued before the Full Court.

Transmission of appeal case. Where an appeal case had not been transmitted within the time limited by section 210 of the Act No. 1120, yet was set down in the list for hearing, it was held that an objection on this ground should be made by moving to have the case struck out of the list, otherwise the appeal would be heard (*c*); and where an appeal case was not transmitted within the proper time, and the only order for enlargement appearing on the case was one made by the judge of the Court of Mines after he had removed from the district, no order was made on the appeal (*d*).

Enlargement of time. The judge of the Court of Mines may make an order for stay of proceedings pending appeal (*e*); and he has the power to rescind or vary his order enlarging the time for transmission of the appeal case, and there is no appeal from the exercise of his discretion (*f*). But where the time for transmitting the appeal case had expired on March 28, and the judge of the Court of Mines enlarged the time to April 21, and on April 29, the case not having then been transmitted, he, with the consent of the attorneys for the parties, further enlarged the time to May 11, it was held that, the second

(*b*) Act No. 1120, sec. 211.
(*c*) *Lewis v. Pearson*, 4 W.W. & A'B. (M.) 23 (1867); *Inskip v. Inskip*, 3 W.W. & A'B. (L.) 24 (1866).
(*d*) *Brennan v. Watson* (2), 6 W. & A'B. (M.) 1 (1869); *Oldgers v. Waldron*, 1 V.R. (M.) 26; 1 A.J.

R. 71 (1870). But see Act No. 1120, sec. 212, empowering a judge to act after his removal from the district.

(*e*) Act No. 1120, sec. 214.
(*f*) *Collins v. Hayes*, 5 W.W. & A'B. (M.) 24 (1868).

enlargement having been granted eight days after the expiration of the previously enlarged time, the judge had no power to enlarge further, and the appeal was gone (*g*). So, the power to grant a further time for transmission of the appeal case must be exercised before the original or extended time has expired (*h*), and the consent of an attorney to the extension will not bind his client after the cause is so out of court (*i*).

*Bk. IV. Ch. IV.
Sec. II.*

The time within which an appeal from a decree of the Court of Mines may be made should run from the time when the decree was pronounced, and not from the time when it was drawn up (*j*).

When time begins to run.

The Full Court on appeal may decide whether some of the defendants below served with notice of the appeal sufficiently represent all the defendants, and may review the decision of the judge of the Court of Mines in the matter (*k*).

Service of notice of appeal.

Objections to appeals must be dealt with by the appellate court, and not by the primary judge (*l*), and an objection which should have been taken in the Court of Mines cannot be entertained on appeal to the Full Court, if such objection was not taken in the court below (*m*).

Objections to appeals.

An appeal from the Court of Mines is practically a rehearing on the evidence stated in the appeal case (*n*); it opens up the whole case, and the appellate court may increase the amount of damages awarded by the court below (*o*).

Effect of appeal.

(*g*) *Odgers v. Waldron*, 1 V.R. (M.) 26; 1 A.J.R. 71 (1870); *Central Co. v. Morgan*, 4 A.J.R. 174 (1873).

(*h*) *Brennan v. Watson* (2), 6 W.W. & A'B. (M.) 1 (1869).

(*i*) *Murphy v. Neil*, 6 W.W. & A'B. (M.) 45; N.C. 19 (1869).

(*j*) *Reg. v. Quinlan, ex parte Sampson*, 10 V.L.R. (L.) 102; 6 A.L.T. 8 (1884).

(*k*) *Thompson v. Begg*, 2 V.R.

(M.) 1; 2 A.J.R. 34 (1871).

(*l*) *Harrison v. Smith*, 6 W.W. & A'B. (E.) 182 (1869).

(*m*) *McLennan v. Myrtle Creek Co.*, 1 V.R. (M.) 39; 1 A.J.R. 157 (1870).

(*n*) *Mole v. Williams*, 3 V.R. (M.) 7; 3 A.J.R. 21 (1872).

(*o*) *United Working Miners G.M. Co. v. Prince of Wales Co.* (2), 6 W.W. & A'B. (E.) 8; N.C. 71 (1869).

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Sec. II.*

Statement of
appeal case.

On appeal to the Full Court from the Court of Mines it is the duty of the judge of the latter court to state the appeal case fully, having reference to the particular points raised before him, and he ought to seek the assistance of both parties to secure the insertion of such facts as they consider material. The Full Court will not travel out of the case to go into evidence which the case omitted to set out, and will not order a rehearing before either the Full Court or the Court of Mines when the evidence is set out sufficiently clearly to leave no doubt as to what the facts really are. But the Full Court will grant a rehearing when the facts material to the decree do not appear to have been made the subject of evidence, or where the evidence was set out *in extenso*, and no conclusion could be arrived at from that evidence (*p*).

N. S. Wales.

In order to give the Full Court jurisdiction to hear an appeal from the Mining Appeal Court in New South Wales there must be a statement in the case to show the points of law raised, the judge's decision thereon, and the facts relating thereto, and also that the appealable amount is involved in accordance with the Act 37 Vic. No. 13 (N.S.W.), sec. 115; it cannot be shown by affidavit before the Full Court that the value of the subject matter is above the appealable amount; where a case was deficient in these particulars it was sent back to the judge for amendment, and the appellant was ordered to pay the costs (*q*).

Judge's notes.

The judge's notes of evidence are only to be taken with reference to the arguments urged before him, and made the ground of appeal; the parties are not allowed to object that such notes did not show evidence of something as to which objection was not taken (*r*).

Supplementary
evidence.

The Full Court cannot control the judge of the Court of Mines, and if he refuses to introduce evidence into the case

(*p*) *Levis v. Pearson*, 4 W.W. & A.B. (M.) 23 (1867).

(*q*) *McKinnery v. Falkner G.M. Co.* (2), 20 N.S.W.L.R. (L.) 262 (1899); 21 N.S.W.L.R. (L.) 66 (1900) F.C.; following *Scully v.*

Murn, 14 N.S.W.L.R. (L.) 289; 10 W.N. 7 (1893); and dissenting from *Lucas v. Bourke*, 3 N.S.W.L.R. (L.) 215 (1882).

(*r*) *Barkers G. M. Co. v. Keating*, 1 A.J.R. 55 (1870).

the Full Court has no power to deal with it. The Chief Judge refused to allow a case to be supplemented by affidavit that evidence not shown in the appeal case was given at the hearing, and he refused to remit the case to be re-stated when the judge of the Court of Mines refused to introduce the whole of the evidence into the case (s). And after the hearing and determination of a mining appeal before a District Court judge in New South Wales, he cannot re-open the case for the purpose of taking evidence of the value of the matter in dispute, so as to state in the appeal case what the value is (t).

*Bk. IV. Ch. IV,
Sec. II.*

No appeal lies to the Full Court from an order of the judge of the Court of Mines granting a new trial. Where a plaintiff in the Court of Mines, on his suit being dismissed, applied for a new trial on the grounds of surprise and the discovery of fresh evidence, and the judge made an order directing a new trial, it was held that no appeal against such order would lie, as in cases of a new trial being granted section 207 of the Act No. 1120 provides for appeal only after the decision on the rehearing (u); but appeal will lie from an order dismissing a summons for commitment under section 192 of the Act No. 1120 (v). An appeal would not lie from the decision of a District Court judge in Queensland (w) as to the costs of an appeal from the Warden; an erroneous application of a rule or supposed rule of law adopted by a judge as a guide in the exercise of his discretion as to costs is not a ground of appeal (x).

Where appeal
will not lie.

The Full Court may make such order with reference to costs as may be considered just and proper (y), and can give costs where there is no jurisdiction to hear the appeal (z).

Costs.

(s) *Mitten v. Spargo*, 1 V.R. (M.) 22; 1 A.J.R. 69 (1870).

(t) *McKinnery v. Falkner G. M. Co.* (1), 20 N.S.W.L.R. (L.) 428 (1899); affirmed by F.C. 21 N.S.W. L.R. (L.) 66 (1900).

(u) *Watson v. Morwood*, 3 V.R. (M.) 1; 3 A.J.R. 21 (1872).

(v) *Vallancourt v. O'Rorke* (2), 2 V.R. (M.) 14; 2 A.J.R. 84 (1871).

(w) 38 Vic. No. 11 (Q.), sec. 74.

(x) *No. 1 North Phoenix G. M. Co., v. Phoenix G. M. Co.*, 6 Q.L.J. 307 (1896).

(y) Act No. 1120, sec 211.

(z) *Watson v. Morwood*, *supra*.

Bk. IV. Ch. IV. Sec. III. In New Zealand the amount of the costs (*w*) to be awarded is in the absolute discretion of the court (*x*).

Order on appeal final.

The order of the Full Court on appeal is final, and is deemed to be a final order of the Supreme Court within the meaning of any Orders in Council in force relating to appeals from that court (*y*).

Death &c. of judge.

In the event of the death, removal or resignation of the judge of the Court of Mines, the appeal will not lapse, but his successor has full power to settle and sign the appeal case (*z*).

SECTION III.—SPECIAL CASE.

Object of special case.

The object of a special case is to determine questions of law. It is not an appeal; the office of a special case is to ask the opinion of the Supreme Court as to the law only, and not to substitute the Supreme Court for a judge or Warden to decide facts upon the balance of evidence (*a*); where a special case embraced questions of fact as set out in the evidence the Chief Judge refused to answer it (*b*). And in New South Wales, as in Victoria, the Supreme Court has no jurisdiction to entertain a special case from the Warden when that officer has not suspended his judgment but has given his decision in respect of the matter on which the question of law has been reserved (*c*).

Other States.

The stating of a special case for the opinion of the Supreme Court is authorised by the Acts of all the other States (*d*).

Statement of case.

The points in difference between the parties must be

- | | |
|--|---|
| <p>(<i>w</i>) 50 Vic. No. 51 (N.Z.).
 (<i>x</i>) <i>Sawyer v. Caledonian G.M. Co.</i>, 8 N.Z.L.R. 475 (1890).
 (<i>y</i>) Act No. 1120, sec. 211.
 (<i>z</i>) <i>Ibid.</i>, sec. 212.
 (<i>a</i>) <i>Keast v. D'Angri</i>, 4 A.J.R. 61 (1873); Act No. 1120, sec. 265.
 (<i>b</i>) <i>Australasia Co. v. Wilson</i>, 5 A.J.R. 18 (1874).</p> | <p>(<i>c</i>) <i>Bowes v. Park</i>, 3 N.S.W.L.R. (L.) 86 (1882).
 (<i>d</i>) 56 & 57 Vic. No. 587 (S.A.), sec. 128; 37 Vic. No. 13 (N.S.W.), sec. 79; 62 Vic. No. 24 (Q.), Part IX, Div. V; 59 Vic. No. 40 (W.A.), sec. 62; 57 Vic. No. 24 (Tas.), sec. 159; 62 Vic. No. 38 (N.Z.), sec. 280.</p> |
|--|---|

succinctly set forth (*e*), and the whole case must be stated, Bk. IV. Ch. IV. Sec. III. and a definite question or questions asked for the opinion of the appellate court (*f*). It is not sufficient to ask if the judge below or the Warden were right in deciding as he did, or in nonsuiting. "This way of asking the propriety of a nonsuit, and not showing in some degree what is the supposed defect in the plaintiff's case according to the judge's view is inconvenient" (*g*). So, asking for the opinion of the court on a motion for prohibition is inconvenient, if not improper (*h*). Neither should a case be stated until all evidence has been taken on both sides (*i*).

The Supreme Court will not answer anything it is not asked, even if it appears on the face of the proceedings (*j*), and it cannot vary a case put before it; it has nothing to do but to answer the case as it stands (*k*), nor will it listen to an objection not raised in the court below. "I have simply to answer the questions put me by the district judge, and it is for him to decide how he will deal with the case after I have given my opinion" (*l*). So, the Supreme Court will not on the hearing of a special case receive affidavits filed after the special case has been stated, but will answer the case as it stands (*m*); and the Chief Judge refused to allow a case to be supplemented by an affidavit that evidence not shown by the case was given at the hearing (*n*); neither will the Supreme Court admit evidence to show that the case has not been properly stated (*o*).

A special case cannot be stated on a question not raised on the original hearing (*p*), and questions depending upon

(*e*) *Thomas v. Kinnear*, 2 W. & W. (L.) 221 (1863).

(*f*) *Byers v. Rolls*, 1 Q.L.J. 36 (1877).

(*g*) *Per Molesworth*, Ch. Judge, in *Loughbottom v. White*, 3 W.W. & A'B. (M.) 35 (1866).

(*h*) *In re Rogers, ex parte Shean*, 2 W.W. & A'B. (L.) 84 (1865).

(*i*) *Ex parte Sea Queen Co.*, 5 A.J.R. 77 (1874); *Reg. v. Cope, in re Moore*, 4 A.J.R. 113 (1873); *Bowes v. Park*, 3 N.S.W.L.R. (L.) 86 (1882).

(*j*) *Fancy v. North Hurdfield*

United Co., 8 V.L.R. (M.) 5; 3 A.L.T. 89 (1882).

(*k*) *Conway v. Louchard*, 10 V.L.R. (M.) 6; 6 A.L.T. 120 (1884).

(*l*) *Per Molesworth*, Ch. Judge, in *Durant v. Jackson*, 1 V.L.R. (M.) 6 (1875).

(*m*) *Conway v. Louchard, supra.*

(*n*) *Mitten v. Spargo*, 1 V.R. (M.) 22; 1 A.J.R. 69 (1870).

(*o*) *Plowman v. Wright*, 4 A.L.R. (C.N.) 1 (1898).

(*p*) *Lennox v. Golden Fleece Co.*, 4 A.J.R. 154 (1873).

Bk. IV, Ch. IV, Sec. III. results of conversation between the judge or Warden and counsel are not proper subjects for a special case (*q*). But where the point raised was not a proper one for a special case, as it did not arise on the hearing of any suit or appeal, according to section 209 of the Act No. 1120, but there was no protest against it, the Chief Judge stated that he would answer the question, not meaning, however, that the judge below should be bound by the answer (*r*); and where on a special case stated by the Warden the party who applied for the case to be stated did not appear on the hearing of the case, the Chief Judge heard the case, and answered the questions (*s*); and where there was no appearance of either party before the Chief Judge, he directed a written opinion to be forwarded to the Warden (*t*). But a motion for the rehearing of a special case was refused on non-appearance of the party applying for the case (*u*). The Supreme Court of New South Wales, however, struck out a special case where there was no appearance of either party, as there was nothing to show that the parties had not settled it (*v*).

Adjudication
after opinion
given.

The opinion of the Supreme Court on a special case stated by the Warden is not a decision of the Warden; and it has been decided by the Privy Council that upon a question submitted the case remains open for adjudication by the Warden, notwithstanding the opinion of the Supreme Court (*w*).

Appeal from
opinion.

No appeal will lie to the Full Court from the opinion of a single judge sitting as the Supreme Court, upon a special case from the Warden (*x*).

Power to state
case.

(a) Stated by the Judge of the Court of Mines.

The judge of the Court of Mines may, of his own motion

(*q*) *Weddell v. Howse* (2), 9 V.L.R. (M.) 13; 4 A.L.T. 179 (1883).

(*r*) *McLeod v. Whitfield*, 2 V.R. (M.) 17; 2 A.J.R. 104 (1871).

(*s*) *Rearlton v. Norton*, 5 V.L.R. (M.) 12 (1879).

(*t*) *Anderson v. Coyle*, 3 W.W. & A'B. (M.) 10 (1866).

(*u*) *Fattorini v. Band and Albion*

Consols (1), 8 V.L.R. (M.) 41; 4 A.L.T. 94 (1882).

(*v*) *Beech v. Haufe*, 4 W.N. (N. S.W.) 31 (1887).

(*w*) *Summers v. Cooper* (2), 5 V.L.R. (M.) 42; 1 A.L.T. 115 (1879).

(*x*) *Abraham v. Della Ca* (2), 23 V.L.R. 454; 4 A.I.R. 36 (1889).

or on the application of either party, at the hearing or re-hearing of any suit or appeal (*a*), or at the trial of any issue reserve any question in the form of a special case for the opinion of the Supreme Court (*b*), and may on the application of either party grant a stay of proceedings and injunction until the special case is heard (*c*); but it is necessary before the judge of the Court of Mines can intervene between the parties and state a special case that it appear on the case that the parties could not agree (*d*).

*Bk. IV. Ch. IV.
Sec. III.*

An application may be made to the judge to state a special case at any time during the hearing. Upon the hearing of an appeal to the Court of Mines, when the solicitor interrupted the judge in the course of delivery of his judgment, and applied to him to state a special case, it was held that the application was not made too late, and that the hearing was not over (*e*).

Application to
state case.

The opinion of the Supreme Court on a special case from the judge of the Court of Mines is not a decree of the latter Court; an order must be drawn up in accordance with the opinion given on the special case, and the decree of the judge of the Court of Mines made in pursuance thereof (*f*). The order so drawn up should be acted on as a decree of the Court of Mines, and the judge can exercise no discretion as to the propriety of the decree, but must regard his duties as simply ministerial in this respect (*g*).

Opinion not a
decree.

The points in difference should be clearly and concisely stated; and under the New South Wales Act it should appear in the special case that the property in dispute is of an appreciable value (*h*). Where a special case, after setting

Statement of
case.

(*a*) Act No. 1120, sec. 265.

(*b*) *Ibid*, sec. 209.

(*c*) *Ibid*, sec. 214.

(*d*) *Inskip v. Inskip*, 3 W.W. & A.B. (L.) 24 (1866); under Act No. 32, sec. 71; compare Act No. 1120, sec. 209.

(*e*) *Hancock v. Vanderstoel*, 17 V.L.R. 671 (1891); *Reg. v. Thomson, ex parte Costin*, 4 V.L.R. (L.) 512, distinguished, the Court de-

ciding in that case as a matter of fact and not as a matter of law that the application was too late.

(*f*) *Ex parte Sea Queen Co.*, 5 A.J.R. 77 (1874); see Act No. 1120, sec. 268.

(*g*) *Bain v. M'Coll*, 4 A.J.R. 62 (1873); 5 A.J.R. 17 (1874).

(*h*) *Scully v. Murn*, 14 N.S.W. L.R. (L.) 289; 10 W.N. 7 (1893).

Bk. IV. Ch. IV. Sec. III. out the whole of the evidence for the plaintiff, concluded by asking whether the plaintiff had established a case, it was sent back to be re-stated in order to show the non-suit points relied on (*i*).

Subject of case. Objections to the hearing of an appeal to the Court of Mines from the decision of the Warden, as to service of notice of appeal, and preliminary objections to the hearing of a suit as to the service of summons, may be the subject of a special case (*j*), but not questions of fact (*k*); and where the judge of the Court of Mines dismissed an appeal, and afterwards one of the appellants applied to have his name struck out, and all proceedings set aside as against him, it was held that this was not a proper point for a special case (*l*).

Questions not raised at hearing.

And if the judge of the Court of Mines decides a case on a point of law not raised during the trial, the judge cannot be compelled to state a special case to the Supreme Court as to a question of law which did not arise at the hearing; proceedings should be taken to set the judgment aside (*m*). But where a defendant in the Court of Mines on an appeal from the decision of the Warden asked for a special case at the close of the evidence for the plaintiff, without stating that he desired to call evidence, he was bound by the decision on the special case, and not allowed afterwards to re-open the case, and call evidence in his behalf (*n*).

Second case may be stated.

Where, however, on a special case from the Court of Mines on an appeal from the Warden several questions are put to the Supreme Court, one of which questions is not at the time material, and is not answered, such question may be asked again in another special case after a further hear-

(*i*) *Thomas v. Kinnear* (1), 2 W. & W. (L.) 221 (1863); *Longbottom v. White*, 3 W.W. & A'B. (M.) 35 (1866).

(*j*) *Murphy v. Neil*, 6 W.W. & A'B. (M.) 45; N.C. 19 (1869).

(*k*) *Australasia Co. v. Wilson*, 4 A.J.R. 18 (1873).

(*l*) *McLeod v. Whitfield*, 2 V.R. (M.) 17; 2 A.J.R. 104 (1871).

(*m*) *Lennox v. Golden Fleece Co.*, 4 A.J.R. 154 (1873).

(*n*) *Reg. v. Cope, in re Moore*, 4 A.J.R. 113 (1873); *Ex parte Sea Queen Co.*, 5 A.J.R. 77 (1874).

ing in the court below, and the judge will be ordered to state such case (o). Bk. IV. Ch. IV. Sec. III.

In section 210 of the Act No. 1120 the judge of the court means the judge for the time being, who is the proper person to state a case (p). A special case is properly signed by the judge of the District Court in New South Wales in which an appeal had been heard, and need not necessarily be signed by the judge whose decision is appealed from (q). Where a case was remitted for the opinion of the court in New Zealand by the proper person, it was held that it was not necessary that it should be signed (r). Who should state case.

On the hearing of a special case from the judge of the Court of Mines on an appeal from the Warden the appellant has the right to begin (s). Right to begin.

The judge of the Court of Mines has a discretionary power to extend the time within which a special case to the Supreme Court shall be transmitted, and no appeal lies from the exercise of such discretion (t). Enlarging time for transmission.

(b) Stated by the Warden.

In any proceeding before the Warden, or before the Warden and assessors, the Warden may, if he think fit, or on the application of either party, reserve any question of law in the form of a special case for the opinion of the Supreme Court (a). The Supreme Court is bound by the terms of the special case submitted, but if the evidence taken before the Warden is not sufficiently stated by him, the court may send the case back for further information (b). Power to state case.

(o) *Talent v. Dibdin*, 8 V.L.R. (M.) 31; 3 A.L.T. 140; 4 A.L.T. 16 (1882).

(p) *Brennan v. Watson* (2), 6 W. & A'B. (M.) 1 (1869); see Act No. 1120, sec. 265.

(q) *Lindsay v. Hanson*, 19 N.S. W.L.R. (L.) 348 (1898).

(r) *Turnbull v. Jones*, 3 N.Z.L.R. (S.C.) 456 (1885).

(s) *United Claims Tribute Co. v. Taylor*, 8 V.L.R. (M.) 19; 3 A.L.T. 147 (1882); see *Stevens v. Webster*, 3 W.W. & A'B. (M.) 23 (1866), over-

ruled by *Mole v. Williams*, 3 V.R. (M.) 7; 3 A.J.R. 21 (1872).

(t) *Collins v. Hayes* (1), 5 W.W. & A'B. (M.) 24 (1868); see *Odgers v. Waldron*, 1 V.R. (M.) 26; 1 A.J.R. 71 (1870).

(a) Act No. 1120, secs. 236, 265.

(b) *Brunt v. No. 2 South Louisa G.M. Co.*, Brisbane Courier, May 15, 1885; see *Thomas v. Kinnear* (1), 2 W. & W. (L.) 221 (1863); *Longbottom v. White*, 3 W.W. & A'B. (M.) 35 (1866).

Bk. IV. Ch. IV.
Sec. III.

Subject of case.

The question of admissibility of evidence in a complaint before the Warden is a proper subject for a special case (*c*), but the Warden may not state a case on questions which he should in his discretion determine himself, such as the preponderance of evidence (*d*). Under the Act No. 1120, sec. 265, schedule xxxiii, the Warden had no power to state a special case on an application for a lease of private land (*e*).

Right to begin.

On a special case from the Warden the complainant in the original proceedings has the right to begin (*f*).

Decision to be in accordance with opinion.

After having received the opinion given by the Supreme Court, the Warden must make his order in accordance with such opinion, and no appeal on any question of law raised by the case will lie from the Warden, or from the Warden and assessors, but such decision will be binding and conclusive on all parties (*g*); and an order made by the Warden after he has refused to state a special case is *ultra vires* (*h*).

Warden may take further evidence.

Where a question on a special case has been answered, and the case has been remitted to the Warden for his opinion on facts, there is nothing to prevent the Warden taking additional evidence on the question which has been left to him (*i*). It is a matter of judicial discretion for the Warden whether, after an answer is given by the Supreme Court to a case stated by him, he should take fresh evidence, or allow an amendment, and no appeal lies from the exercise of such discretion (*j*). Thus, when the Supreme Court has given an answer to a question, viz., that miners' rights should have been produced, the appellant may then apply to the Warden for a rehearing to produce further evidence. "Virtually my answer was a decision only as far as it went; all other points

(*c*) *Palmer v. Chisholm*, 5 A.J.R. 169 (1874).

(*d*) *Small v. Dyer*, 5 W.W. & A'B. (M.) 1 (1868).

(*e*) *In re Smith*, 21 V.L.R. 80; 17 A.L.T. 78; 1 A.L.R. 64 (1895). See now Leasing Regulations, cl. 14, *et seq.*

(*f*) *Fahcy v. Koh-i-noor Q. M. Co.*, 3 W.W. & A'B. (M.) 4 (1866), followed in *Abraham v. Delta Ca* (3), 4 A.L.R. 204 (1898); see *United Claims Tribute Co. v. Taylor*, 8

V.L.R. (M.) 19; 3 A.L.T. 147 (1882); *Mole v. Williams*, 3 V.R. (M.) 7; 3 A.J.R. 21 (1872), overruling *Stevens v. Webster*, 3 W.W. & A'B. (M.) 23 (1866).

(*g*) Act No. 1120, sec. 268.

(*h*) *Reg. v. Thomson, ex parte Costin*, 4 V.L.R. (L.) 512 (1878).

(*i*) *Clerk v. Wrigley*, 4 W.W. & A'B. (M.) 74 (1867).

(*j*) *United Claims Tribute Co. v. Taylor*, 8 V.L.R. (M.) 19; 3 A.L.T. 147 (1882).

were left open. The Privy Council has decided (*k*) that upon questions submitted by special case the case remains open for adjudication by the original court, notwithstanding my answer thereto" (*l*). *Bk. IV. Ch. IV. Sec. III.*

The Supreme Court had no power to grant costs on a special case stated under the Act No. 32 (*m*), but under the Act No. 1120, sec. 268, the Supreme Court may upon the argument of any special case make such order with respect to costs as it may think proper (*n*); and costs should be given to the successful party (*o*). *Costs.*

Where the Warden refuses to state a case, and a rule *nisi* is obtained and made absolute directing him to do so, the Supreme Court on a special case will not give costs against the Warden unless they are specially asked for in the rule *nisi* (*p*). *Costs against Warden.*

No definite form is provided of a special case from the Warden or the Court of Mines for the opinion of the Supreme Court. A case stated by the Warden may be in the following form:— *Form of special case.*

In the Supreme Court.

In the matter of a complaint before the Warden at S. between

A. B.	complainant
and	
C. D.	defendant.

Special case stated by the Warden at S. for the opinion of the Supreme Court.

This case was commenced by summons, by which the complainant sought [*copy complaint of summons*].

The said summons came on for hearing before me the undersigned Warden [*or Warden and assessors*] at S. on the _____ day 190____, both parties being represented by counsel, when it was proved [*state concisely and clearly the evidence given before the Warden, and the points raised*].

After hearing arguments I reserved for the opinion of the Supreme Court the following questions of law:—

[*set out severally the questions reserved*].

(*k*) *Smith v. Harrison*, 6 W.W. & A.B. (E.) 182 (1869); see judgment on appeal to Privy Council in 3 A.J.R. 44.

(*l*) *Per Molesworth*, Ch. Judge, in *Summers v. Cooper* (2), 5 V.L.R. (M.) 42 (1879).

(*m*) *Jenkinson v. Cumming*, 1 W.

& W. (L.) 337 (1862).

(*n*) *Fattorini v. Band and Albion Consols*, (2), 9 V.L.R. (M.) 1; 4 A.L.T. 121 (1883).

(*o*) *Allison v. Sharp*, 17 A.L.T. 240; 2 A.L.R. 50 (1896).

(*p*) *Grant v. Lawlor*, 3 V.L.R. (M.) 15 (1877). As to proceedings

Bk. IV. Ch. IV. A case stated by the judge of the Court of Mines may be
Sec. III. in a similar form, *mutatis mutandis*.

Practice in
 stating case.

The case is drawn up by the attorney of the party requiring the case to be stated, and if necessary is settled by counsel, after which a draft is delivered to the other side for approval ; and if the parties cannot agree as to the form of the case it is settled by the Warden. It is then engrossed and signed by the Warden after which it is entered for argument with the prothonotary, and notice of setting down is served, with a copy of the case, on the other side.

Either party
 may apply for
 special case.

A special case for the opinion of the Supreme Court may be applied for by either party, and in such case proceedings may be stayed on such terms as the Warden may think fit until the opinion shall be given (*q*). If the Warden refuse to state a case on such application he cannot make an order until after the expiration of ten days from the day of such refusal (*r*) ; and the applicant may within such ten days apply to the Supreme Court for a rule *nisi* calling upon the Warden to show cause why he should not state the case.

on refusal by the Warden to state a
 special case, see Act No. 1120, sec.
 266.

(*q*) Act No. 1120, sec. 265.
 (*r*) *Ibid*, sec. 266.

APPENDIX.

NOTE.

The statute law relating to mining in the other States and New Zealand is comprised in the following Acts in force in the respective States :—

NEW SOUTH WALES.—“*The Mining Act 1874*” (37 Vic. No. 13), and its amendments, 43 Vic. No. 28, 46 Vic. No. 7, 48 Vic. No. 10, 48 Vic. No. 17, 53 Vic. No. 20, 57 Vic. No. 18; “*The Mining on Private Lands Act of 1894*” (57 Vic. No. 32), and the amending Act of 1896, 60 Vic. No. 40.

QUEENSLAND.—“*The Mining Act of 1898*” (62 Vic. No. 24).

WESTERN AUSTRALIA.—“*The Goldfields Act 1895*” (59 Vic. No. 40), and its amendments, 60 Vic. No. 36, 62 Vic. No. 16; “*The Mining on Private Property Act 1898*” (62 Vic. No. 29), and an amending Act, 63 Vic. No. 31; “*The sluicing and Dredging for Gold Act 1899*” (63 Vic. No. 43).

SOUTH AUSTRALIA.—“*The Mining Act 1893*” (56 & 57 Vic. No. 587); “*The Mining on Private Property Act 1888*” (51 & 52 Vic. No. 448), and an amending Act, 58 & 59 Vic. No. 626.

TASMANIA.—“*The Mining Act 1893*” (57 Vic. No. 24), and its amendments, 59 Vic. No. 35, 63 Vic. No. 39.

NEW ZEALAND.—“*The Mining Act 1898*” (62 Vic. No. 38), and an amending Act, 63 Vic. No. 29.

Comparative references have been made throughout the Appendices to such of these Acts as are similar or analogous to the provisions of the Mines Acts of Victoria, by inserting at the end of the sections of the latter Acts, where they apply, the number and section of such of the Acts of the other States as correspond with or are analogous to the Victorian law.

APPENDIX (A).

THE MINES ACT 1890

(54 VIC. No. 1120).

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An Act to consolidate the Law relating to Mines.
[10th July, 1890.]

"Mining Statute
1865."

BE it enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows (that is to say):—

Short title
commencement
and division.

1. This Act may be cited as the *Mines Act 1890*, and shall come into operation on the first day of August One thousand

eight hundred and ninety, and is divided into Parts Divisions ^{"Mining Statute 1865."} and Subdivisions as follows :—

PART I.— Mining on Crown Lands.	Division 1.— Mining Management.	<ul style="list-style-type: none"> (1) Miner's Right ss. 4–10. (2) Business Licence ss. 11–13. (3) Miner's Right and Business Licence ss. 14–26. (4) Residence Areas ss. 27–48. (5) Mining Leases ss. 49–58. (6) Leases of Reservoirs ss. 59–62. (7) Licences to search for Metals and Minerals other than Gold s. 63. (8) Licences to cut Races &c. s. 64. (9) Miscellaneous Provisions relating to Leases and Licences ss. 65–79. (10) Mining Districts s. 80. (11) Mining Officers ss. 81–83. (12) Mining Boards ss. 84–114. 		
		Division 2.— Courts and Procedure.	(1) Courts of Mines.	<ul style="list-style-type: none"> (a) General Provisions ss. 115–134. (b) Jurisdiction of Courts ss. 135–138. (c) Proceedings in Courts of Mines ss. 139–182. (d) Enforcement of Decrees and Orders ss. 183–194. (e) Interlocutory and Miscellaneous Orders ss. 195–206. (f) Re-hearing Special Cases and Appeals ss. 207–214.
(2) War- dens.				<ul style="list-style-type: none"> (a) General Provisions ss. 215–242. (b) Special Powers and Duties ss. 243–253. (c) Appeals ss. 254–269.
				(3) Miscellaneous Provisions ss. 270–286.
				Division 3.—Penalties ss. 287–298.

"Mining Statute 1865." PART II.—Mining on Private Property ss. 299–350.

PART III.—
 General Provisions. { Division 1.—Regulation of Mines and Mining Machinery ss. 351–376.
 Division 2.—Drainage of Mines ss. 377–386.
 Division 3.—Accidents Relief Fund ss. 387–399.

Repeal.
 First Schedule.

2. The Acts mentioned in the First Schedule to this Act to the extent to which the same are thereby expressed to be repealed are hereby repealed. Provided that such repeal shall not affect any Board elected, or any district erected, or any proclamation appointment election rule regulation by-law order registration valuation nomination complaint application declaration affidavit assignment award grant or decree made, or any miner's right consolidated miner's right licence debenture precept writ plaint summons or summons issued, or any warrant or injunction granted, or any notice notification certificate or security given, or any service effected, or any agreement lease contract mortgage bond recognisance conveyance transfer or deed existing in force effected entered into executed, or any compensation due or payable under the said Acts or any of them save and except where by this Act it is otherwise expressly provided before the commencement of this Act. [cf. 37 Vic. No. 13 (N.S.W.), sec. 3; 62 Vic. No. 24 (Q.), sec. 4; 57 Vic. No. 24 (Tas.), sec. 4].

PART I.—MINING ON CROWN LANDS.

Interpretation.
Ib. s. 3.

3. In the construction and for the purposes of this Part of this Act the following terms shall, if not inconsistent with the context or subject-matter, have the respective meanings hereby assigned to them (that is to say) :—

"Claim."

"Claim" shall mean a parcel of Crown land which any person in accordance with any by-laws of any mining board shall have taken possession of and be entitled to occupy for the purpose of seeking gold therein or any number of such parcels lawfully amalgamated by their owners, but shall not include any land comprised in any lease granted under any Act heretofore or now or hereafter to be in force authorizing the granting of leases for mining purposes :

- “ Crown land ” shall include all lands of the Crown : “ Mining Statute
1865.”
- “ Earth ” shall include any rock stone quartz clay sand soil and mineral : “ Crown land.”
“ Earth.”
- “ Gold ” shall signify as well any gold as any earth containing gold or having gold mixed in the substance thereof or set apart for the purpose of extracting gold therefrom : “ Gold.”
- “ Mine ” shall mean and include any place pit shaft drive level or other excavation drift gutter lead vein lode or reef wherein or whereby any operation for or in connexion with mining purposes is or shall be carried on upon Crown land : “ Mine.”
- “ Miner ” shall mean any person engaged or interested in any such operation : “ Miner.”
- “ Mining purposes ” shall mean the purpose of obtaining gold or any metal or mineral other than gold by any mode or method and of stacking or otherwise storing any earth : “ Mining
purposes.”
- “ To mine ” shall mean to disturb remove cart carry wash sift smelt refine crush or otherwise to deal with any earth by any mode or method whatsoever for the purpose of obtaining therefrom gold or any metal or mineral other than gold : “ To mine.”
- “ Warden ” shall mean one of Her Majesty’s wardens of the goldfields in and for Victoria or in and for any district thereof. [cf. 37 Vic. No. 13 (N.S.W.), sec. 2 ; 62 Vic. No. 24 (Q.), sec. 3 ; 56 & 57 Vic. No. 587 (S.A.), sec. 4 ; 57 Vic. No. 24 (Tas.), sec. 4 ; 59 Vic. No. 40 (W. A.), sec. 4 ; 62 Vic. No. 38 (N.Z.), sec. 5]. “ Warden.”

DIVISION 1.—MINING MANAGEMENT.

(1) *Miner’s Right.*

4. It shall be lawful for the Governor in Council to cause documents to be issued, each of which shall be called a “ Miner’s Right ” and which shall be in force for any number of years not

Miner’s right to
issue.
Ib. s. 4.

"Mining Statute 1885." exceeding fifteen ; and any such document shall be granted to any person applying for the same upon payment of a sum at the rate of two shillings and sixpence* for every year for which the same is to be in force. [cf. 59 Vic. No. 40 (W.A.), sec. 14 ; 57 Vic. No. 38 (N.Z.), sec. 63 ; 56 & 57 Vic. No. 587 (S.A.), sec. 27 ; 37 Vic. No. 13 (N.S.W.), sec. 14 ; 62 Vic. No. 24 (Q.), secs. 11, 12 ; 57 Vic. No. 24 (Tas.), sec. 23].

*See No. 1514,
s. 8.

"Consolidated
Miner's Right."

It shall also be lawful for the Governor in Council to cause other documents to be issued, each to be called a "Consolidated Miner's Right" and to be in force for any number of years not exceeding fifteen ; and any such last-mentioned document shall, on the application of the manager or any trustee or trustees of any company of persons who shall have agreed to work in partnership any claim or claims registered under the provisions hereof, be granted to such manager trustee or trustees on behalf of the persons who shall from time to time be members of such company ; and shall during its continuance be held by the manager or the trustee or trustees for the time being of such company on behalf of such last-mentioned persons ; and shall be in lieu of and represent and be of the same force and effect as a number of miner's rights granted for the same period of time equal to the number of miner's rights by virtue of which the said claim or claims shall have originally been taken possession of ; and the same shall be granted to any person aforesaid so applying on payment of a sum at the rate aforesaid multiplied by the number of miner's rights which the same is to represent. [cf. 62 Vic. No. 24 (Q.), sec. 13 ; 56 & 57 Vic. No. 587 (S.A.), sec. 27 ; 57 Vic. No. 24 (Tas.), sec. 24 ; 59 Vic. No. 40 (W.A.), sec. 15 ; 62 Vic. No. 38 (N.Z.), sec. 65].

See No. 1514,
s. 9.

Every such document shall be dated of the day and at the place of the issuing thereof, and shall state the number of years for which it is to be in force, and contain the christian name and surname and the residence of (in case of a miner's right) the person in whose favour the same shall be issued, and (in case of a consolidated miner's right) the manager or trustee or trustees to whom and the name of the company on whose behalf the same shall be issued.

Second
Schedule.
First Part.

Every such miner's right shall be in the form in the First Part of the Second Schedule to this Act ; and every such consolidated

miner's right shall be in the form in the Second Part of the said schedule.

"Mining Statute
1865."
Second
Schedule.
Second Part.

Provided that the term "miner's right" where it occurs throughout this Part of this Act shall, unless inconsistent with the context, be taken to mean and include a consolidated miner's right.

Provided also that when any such consolidated miner's right shall be granted, the miners' rights of the persons in whose behalf the same shall be granted shall be retained by them, and such persons shall be respectively deemed holders of miners' rights within the meaning of this Part during the continuance of such consolidated right.

5. Any person who shall be the holder and any number of persons in conjunction who shall each be the holder of any such miner's right shall, subject to the provisions of this Part of this Act and to the by-laws to be made as hereinafter mentioned, be entitled (except as against Her Majesty) to take possession for gold mining purposes of a parcel or of so many parcels as such by-laws shall permit of Crown land in such manner of such quantity and dimensions and with such boundaries as shall be directed by such by-laws, such dimensions and boundaries to be fixed at the time of the taking of such possession or partially then and partially at some subsequent time according as shall be by such by-laws directed; and every such parcel to be from time to time subject to such adjustment as to quantity dimensions boundaries and form as shall be prescribed by such by-laws; and any such person or persons who shall have so taken possession of any such parcel or parcels shall, either by himself or themselves or in conjunction with the holder or holders of any share or shares to be created in such parcel or parcels as hereinafter permitted, be, during the continuance of such miner's right or miners' rights or of a consolidated miner's right granted in lieu of any miners' rights, entitled to occupy for gold mining purposes such parcel or parcels: and every holder of a miner's right and every person on whose behalf any consolidated miner's right shall be granted shall, subject as aforesaid and during such continuance, be entitled (but subject to any right which may be obtained by any person under any licence granted by the Governor or the Board of Land and Works for the cutting construction and using of races tail-

Privileges
conferred by a
miner's right.
Ib. s. 5.

See No. 1514,
s. 6.
Claim.

See No. 1514,
s. 25, 73.

"Mining Statute 1865." races drains dams or reservoirs for gold mining purposes) to cut

Races dams &c. construct and use races dams and reservoirs for mining purposes through and upon any Crown lands, and to take or divert water from any spring lake pool or stream situate or flowing through or adjoining Crown lands and to use such water for mining for gold and for his own domestic purposes, and to use by way of an easement any unoccupied Crown lands. [cf. 62 Vic. No. 24 (Q.), secs. 15, 16 ; 56 & 57 Vic. No. 587 (S.A.), secs. 30, 33 ; 57 Vic. No. 24 (Tas.), sec. 28 ; 37 Vic. No. 13 (N.S.W.), sec. 15 ; 59 Vic. No. 40 (W.A.), sec. 16 ; 62 Vic. No. 38 (N.Z.), sec. 64].

Residence area. Every holder of a miner's right shall, during the continuance thereof and subject as aforesaid, be entitled to occupy on any gold-field for the purpose of residence so much of the Crown lands as shall be prescribed by such by-laws ; and every such holder and every person on whose behalf any consolidated miner's right shall be held shall be entitled for the purposes of the privileges hereby given to them respectively to put up and at any time to remove any building or other erection, and also to cut any live or dead timber except blackwood and to remove the same and to strip and remove the bark from any such timber, and also to remove any stone or gravel for mining purposes, and (in the case of the holder of a miner's right) for building for himself any place of residence or of business or for mining purposes or for fuel or otherwise for his personal use, from any Crown lands not exempted nor excepted from occupation for mining under any Act relating to the gold-fields nor declared under any Act relating to the Crown lands to be either temporarily or permanently reserved from sale nor being or included in any land named in any proclamation of the Governor in Council declaring that no person shall cut or remove such timber bark stone or gravel from any portion of Crown land named in such proclamation nor being or included in any land proclaimed as a reserve for the preservation and growth of timber ; and also to make tramways or other roads for the carrying out and in aid of such purposes. [cf. 57 Vic. No. 24 (Tas.), sec. 29 ; 59 Vic. No. 40 (W.A.), regs. cl. 40 ; 62 Vic. No. 38 (N.Z.), sec. 117].

Cutting of timber. *See post*, sub. (4), s. 27.

See No. 1514, s. 9.

Making of tramways.

The person or persons by whom such parcel or parcels of land or any land occupied for residence as aforesaid shall be so occupied shall, subject as aforesaid and during such continuance as afore-

said, be deemed in law to be possessed (except as against Her Majesty only) of such parcel or parcels or of such land and the property therein; and every share or interest which may be created therein as hereinafter mentioned shall be deemed a chattel interest; and during such continuance as aforesaid all gold then being in and upon any such parcel shall (except as against Her Majesty) be the absolute property of the person or persons for the time being in the lawful occupation of such parcel; and every such parcel or any number of such parcels amalgamated by their owners shall be called a claim. [cf. 62 Vic. No. 38 (N.Z.), sec. 139].

"Mining Statute 1865."

Share or interest in land occupied under miner's right or for residence to be chattel interest.

Provided that no person shall be entitled by this Part or under any such by-law to occupy for the purpose of residence more than one piece of land (a), the same not to exceed one acre in extent and to be situated with respect to any street or otherwise as shall be provided for by the said by-laws; and the holder of any such piece of land may assign and encumber the same in such manner and subject to such regulations as to registry as such by-laws shall direct, and in default of such direction either orally or by any instrument in writing. Provided that no person shall obtain any interest under any such assignment save a person who shall be the holder of a miner's right. [cf. 59 Vic. No. 40 (W.A.), regs. cl. 40; 62 Vic. No. 38 (N.Z.), sec. 119].

Limit to size of residence area. *"The Residence Areas Act 1884," s. 2.*

See post, sub. (4), s. 27.

6. Any incorporated mining company may for the purpose of taking or accepting transfer of any mining claim or mining claims, or for the purpose of holding any mining claim or mining claims which may have been transferred to any such company, apply for and obtain so many miners' rights in the name of the corporation as shall be required under the mining board by-laws in force in the district to hold the claim or claims so transferred. [cf. 59 Vic. No. 40 (W.A.), sec. 18].

Miner's rights may be applied for in name of incorporated mining company.

Act No. 446, s. 29.

7. The person or persons or any of them who shall have taken possession or be in the occupation of any claim as aforesaid, or the executors or administrators or the assignee or assignees in insolvency or the guardian in infancy or the committee or guardian in lunacy or the purchaser under an execution of the interest

Claims may be registered.

"Mining Statute 1865," s. 6.

See No. 1514, s. 65.

(a) See sec. 29, permitting an additional residence area to be held beyond a distance of ten miles from the first area.

“*Mining Statute* of such person or of any of such persons, may in such manner as 1865.”
 such by-laws shall direct register such claim by some name; and the owner of any share as hereinafter mentioned in a registered claim may register such share in such manner as such by-laws shall prescribe. Provided that no claim shall be registered unless the miner’s right or miners’ rights under which such claim shall be held shall be produced to the officer required to register the same. [cf. 37 Vic. No. 13 (N.S.W.), sec. 16; 56 & 57 Vic. No. 587 (S.A.), secs. 42, 43; 62 Vic. No. 38 (N.Z.), reg. 56].

Privileges of registered claim-holders.
Ib. s. 7.

8. After a claim shall be registered as aforesaid but not before, the owner or owners thereof for the time being may, subject to the said by-laws, from time to time divide the interest in such claim into such and so many shares as he or they shall think proper, and any of which may be appropriated to any person or persons; and may assign or encumber or create any interests in such claim; and the owner or owners for the time being of any such share may, if the same shall be registered subject as aforesaid, assign or encumber or create any interest in such share; and in both cases (that is to say) in regard to both claims and shares, in such manner and subject to such registration as such by-laws shall direct, and until and in default of such direction either orally or by any instrument in writing.

Miner’s right may be assigned.

Provided that the miner’s right or miners’ rights under which any claim shall be held may be transferred to or to any person on behalf of the assignee or assignees of any such claim; and the officer appointed to register claims shall upon being so required indorse the name of the transferee upon the right or rights so transferred; and thereupon the same shall for the remaining period of its currency vest in the transferee thereof as fully as if he had been the original grantee thereof, but subject to any trusts or provisions agreed upon on the occasion of such transfer. [cf. 37 Vic. No. 13 (N.S.W.), sec. 17; 56 & 57 Vic. No. 587 (S.A.), sec. 32; 62 Vic. No. 38 (N.Z.), sec. 84].

* Substituted by No. 1514, s. 10.

* Provided also that notwithstanding anything herein contained it shall be lawful for the owners of any two or more adjoining claims to amalgamate the same in such number in such manner and under such conditions as shall be permitted by the by-laws of the mining district in which such claims are situated.

[cf. 56 & 57 Vic. No. 587 (S.A.), secs. 45, 46 ; 62 Vic. No. 38 (N.Z.), secs. 62, 129]. “Mining Statute 1865.”

9. If there be held from time to time by or on behalf of the owner or owners for the time being of a registered claim such number of miners' rights as would have authorized the taking possession thereof when the same was taken possession of or a consolidated miner's right representing such number, the same shall be sufficient, and it shall not be necessary that any other miner's right should be held by any shareholder in such claim as such shareholder. Provided that the word “owner” in this and the two next preceding sections shall be taken to include any such guardian or committee as aforesaid. [cf. 37 Vic. No. 13 (N.S.W.), sec. 20.] Necessary number of miners' rights or a consolidated right sufficient. *Ib.* s. 8. “Owner.”

10. Any claim which shall be apparently unoccupied and upon which there is no plant or machinery and has been unworked for a longer period than is allowed by the by-laws for the district, or for any division or part thereof in which such claim is situated, shall be deemed to be actually abandoned ground, and may without any adjudication of forfeiture or abandonment be taken up and registered as a claim in accordance with the by-laws by any holder of a miner's right, but subject nevertheless to the rights (if any still subsisting) of any previous occupant of such ground. [cf. 59 Vic. No. 40 (W.A.), regs. cl. 84 ; 62 Vic. No. 38 (N.Z.), sec. 151]. When claim shall be deemed abandoned. *Act No. 446, s. 27.*

(2) *Business Licence.*

11. It shall be lawful for the Governor to cause documents to be issued, each of which shall be called a “Business Licence,” and which shall be granted to any person applying for the same upon payment of the sums hereinafter mentioned (that is to say) if such person shall apply for a licence for six months, two pounds ten shillings; or if for twelve months, five pounds; and every such document shall be in the form in the Third Schedule to this Act, and shall be dated of the day and at the place of the issuing thereof, and shall be in force for such of the said periods as shall be named therein, and shall contain the christian name and surname and the occupation and residence of the person in whose favour the same shall be issued. [cf. 37 Vic. No. 13 (N.S.W.), Business licence. “Mining Statute 1865,” s. 9. Third Schedule.

"*Mining Statute* 1865," sec. 21 ; 62 Vic. No. 24 (Q.), sec. 17 ; 56 & 57 Vic. No. 587 (S.A.), sec. 65 ; 59 Vic. No. 40 (W.A.), sec. 19 (1) ; 62 Vic. No. 38 (N.Z.), sec. 117 ; 63 Vic. No. 29 (N.Z.), sec. 5].

Occupation under business licence.

Ib. s. 10.

Residence area.

"*The Residence Areas Act* 1884," s. 2.

12. Every business licence shall, subject to the provisions of this Part of this Act and to such by-laws as aforesaid, entitle the holder thereof during the continuance of such licence to occupy on any goldfield for the purpose of residence and carrying on his business so much of the Crown lands not exceeding one acre in extent as may be prescribed by the said by-laws, and for either of the purposes aforesaid to put up any building or other erection, and at any time to remove the same ; and every such holder shall during the continuance of such business licence be deemed in law to be possessed (except as against Her Majesty) of the land which he shall occupy by virtue of such licence ; and the property in such land shall be deemed a chattel interest ; and no person shall be entitled by virtue of a business licence to occupy more than one such portion of land. [cf. 37 Vic. No. 13 (N.S.W.), sec. 22 ; 62 Vic. No. 24 (Q.), sec. 19 ; 56 & 57 Vic. No. 587 (S.A.), sec. 66 ; 59 Vic. No. 40 (W.A.), sec. 19 (2), (3) ; 62 Vic. No. 38 (N.Z.), sec. 118].

Business licence may be transferred.
"Mining Statute 1865," s. 11.

13. The holder of any such business licence or of any such business licence as next hereinafter mentioned shall be entitled to transfer the same respectively to any other person ; and provided he shall express his desire so to do in writing under his hand indorsed on the said licence and signed by him in the presence of and attested by any warden or justice, another business licence shall be granted to the person named in such indorsement upon production and surrender of such licence and indorsement and upon payment of the sum of ten shillings ; and every such last-mentioned business licence shall be dated of the day and at the place of the issuing thereof, and shall be in force for the then unexpired period of the licence first indorsed as aforesaid, the day when such unexpired period is to end being stated in every such indorsement, and shall contain the christian name and surname and the occupation and residence of the person in whose favour the same shall be issued ; and every such business licence together with the right and interest thereunder shall on the death or insolvency of the holder thereof devolve on his personal representative or assignee in insolvency. [cf. 37 Vic. No. 13 (N.S.W.), sec. 23 ;

62 Vic. No. 24 (Q.), sec. 20; 56 & 57 Vic. No. 587 (S.A.), sec. 66; "Mining Statute
59 Vic. No. 40 (W.A.), sec. 19 (4), (8); 62 Vic. No. 38 (N.Z.),
secs. 135, 140].
1865."

(3) *Miner's Right and Business Licence.*

14. If any person who shall have been the holder of a miner's right consolidated miner's right or business licence shall not on or before the day of the expiration thereof have taken out a new right or licence (as the case may be), a new right or licence, dated of the day of such expiration and which shall have the same force and efficacy as if it had been issued on that day, may nevertheless within one month from such expiration be granted to such person, upon production of such expired right or licence and upon payment of the sum of five shillings in the case of a miner's right or in case of a consolidated miner's right five shillings for every right represented thereby and twenty-five per centum of the sum hereinbefore made payable in the case of a business licence in addition to the ordinary price of a miner's right consolidated miner's right or business licence; and every new miner's right consolidated miner's right or business licence so issued shall be in such one of the forms in the Second and third Schedules to this Act as shall be applicable. [cf. 37 Vic. No. 13 (N.S.W.), sec. 24; 59 Vic. No. 40 (W.A.), sec. 20; 63 Vic. No. 29 (N.Z.), sec. 2].

Miner's right and business licence may be antedated in certain cases.
Ib. s. 12.
See No. 1514, s. 8.
Second and Third Schedules.

15. Notwithstanding the provisions herein contained, all Crown lands which shall have been applied to any public use or purpose, (a) or which shall be lawfully and *bonâ fide* used as a yard garden cultivated field or orchard, or upon which any house outhouse shed or other building provided the same shall be in actual use and occupation or any artificial dam or reservoir shall be lawfully standing, shall be and the same are hereby exempted from occupation for mining purposes and for residence or business under any miner's right or business licence. Provided that any Crown lands which shall have been so lawfully and *bonâ fide* used as aforesaid or upon which any house outhouse shed or building or any artificial dam or reservoir shall be standing shall, upon payment of compensation to be ascertained and paid in the manner

Certain lands exempted.
Ib. s. 13.

(a) See 54 Vic. No. 1106 (*Land Act* 1890), section 10.

“*Mining Statute 1865.*” prescribed by any by-law made by a mining board, cease to be exempted from occupation for mining purposes. [cf. 37 Vic. No. 13 (N.S.W.), sec. 25 ; 62 Vic. No. 24 (Q.), sec. 23 ; 56 & 57 Vic. No. 587 (S.A.), sec. 9 ; 59 Vic. No. 40 (W.A.), sec. 21 ; 62 Vic. No. 38 (N.Z.), Part III ; and see 48 Vic. No. 10 (N.S.W.), sec. 2.]

Commons not to be deemed lands applied to public purposes. *Act No. 316, s. 1.* **16.** Crown lands which have been or shall be proclaimed as a common shall not be deemed to have been or to be applied to any public use or purpose within the meaning of this Part of this Act or of the “*Mining Statute 1865,*” or of any Act repealed by that Act.

Other lands may be excepted. “*Mining Statute 1865,*” s. 14. **17.** [Repealed and re-enacted by No. 1514, sec. 11]:—17. The Governor in Council may at any time either by a general or particular description except from occupation for mining purposes or for residence or business under any miner’s right or business licence or from being leased under a mining lease any specific portion of Crown lands or any class of Crown lands ; and no land so excepted or included in any class so excepted shall be occupied under any miner’s right or business licence until such exception be revoked nor until revoked shall it be lawful for any person to mark out or apply for a mining lease of such land or any part thereof, and any such marking out or application shall be null and void. [cf. 37 Vic. No. 13 (N.S.W.), sec. 26 ; 62 Vic. No. 24 (Q.), sec. 47 ; 57 Vic. No. 24 (Tas.), sec. 191 ; 59 Vic. No. 40 (W.A.), sec. 22].

Occupation of exempted or excepted lands may be allowed. *Ib. s. 15.* **18.** No person shall cut or remove from any lands so exempted or excepted as aforesaid any live timber or earth, or mine or employ any other person to mine in or upon, or unless authorized thereto by a licence granted under this Part of this Act cut or construct any race or dam or any tramway through over or upon such lands, or do in or upon such lands any of the other acts or things or exercise any of the privileges hereinbefore allowed and granted to the holder of a miner’s right. [cf. 37 Vic. No. 13 (N.S.W.), sec. 27 ; N.S.W. regs., 1874 ; 57 Vic. No. 24 (Tas.), sec. 37 ; 59 Vic. No. 40 (W.A.), sec. 23 ; 62 Vic. No. 38 (N.Z.), Part III].

° *Sic* ; insert “be.”

Nevertheless it shall* lawful for the Governor in Council, upon application to him for that purpose, to authorize any one or more

than one holder of a miner's right or the holders generally of miners' rights to occupy under the same any Crown lands which may have been so excepted as aforesaid; and also to construct drives under any lands so exempted as aforesaid, if it shall be made to appear to the satisfaction of such Governor that such drives can be constructed without injury to or obstruction to the enjoyment of such exempted lands; and such occupation and construction of drives shall be subject to such conditions restrictions and regulations as the Governor in Council shall impose and make, and so far as shall not be inconsistent therewith to such by-laws as aforesaid. Provided that where such lands are within any borough, notice of such application shall, one month before the same shall be made, be given to the mayor of such borough and published in some newspaper circulating in the neighbourhood of such lands.

19. It shall be lawful for the holder of a miner's right or of a lease under this Part of this Act to mine upon or under any street road or highway, on obtaining from the Board of Land and Works if such Board shall have the care and management thereof or from such other body as shall have such care and management an order permitting him so to do; and for the purpose of obtaining such order, such holder shall apply therefor by notice in writing to such Board or other body, who shall thereupon decide whether the same can be effected without injury to adjoining property or injury or obstruction to such public road street or highway as the case may be; and thereupon the said Board or body shall issue its order, permitting on such conditions and terms and subject to such restrictions as it shall think fit or forbidding such mining as the case may require. [cf. 37 Vic. No. 13 (N.S.W.), sec. 28; 56 & 57 Vic. No. 587 (S.A.), secs. 8, 36; 57 Vic. No. 24 (Tas.), sec. 58; 63 Vic. No. 29 (N.Z.), sec. 18].

20. It shall be lawful for the Board of Land and Works or other body having the care and management of any public road street or highway, upon application thereto by any holder of a miner's right or of a lease under this Part of this Act, and upon the report of any engineer or surveyor that a sluice-box tramway or culvert can be laid or constructed on or under any such public road street or highway without any substantial injury to or obstruction of the traffic thereon and that such sluice-box tramway

*"Mining Statute
1865."*

*Claims under
public roads.
Ib. s. 16.*

*Managers of
public roads
may allow
sluice-boxes
tramways and
culverts under
public roads.
Ib. s. 17.*

"Mining Statute or culvert is necessary for the due and proper working of any mine or for the conveyance of water for mining purposes by order in writing made after inspection by some officer of such Board or body of the road street or highway mentioned in such report subject to the rights of occupiers of adjoining or contiguous lands, to allow such sluice-box tramway or culvert to be laid or constructed by any holder of a miner's right or of a lease under this Part of this Act for the purpose of conveying any water tailings sludge or waste water or earth.

1865."

Provided that such works shall be so constructed as not to substantially injure such road street or highway or obstruct the traffic thereon; and if after the construction of any such sluice-box tramway or culvert under such order it shall be made to appear to such Board or body that the same doth so injure such road street or highway or obstruct the traffic thereon, it shall be lawful for such Board or body to order that the obstruction be removed; and if after seven days from the date of such last-mentioned order the obstruction caused by such sluice-box tramway or culvert shall not be removed or remedied, the same shall be deemed a nuisance; and the person who shall have obtained the said first-mentioned order or the owner or occupier shall be liable to a penalty not exceeding Twenty pounds; and the said nuisance may be abated by an order of any justice upon proof of the said last-mentioned order and of the disobedience thereof. [cf. 37 Vic. No. 13 (N.S.W.), sec. 29; 57 Vic. No. 24 (Tas.), sec. 59; 59 Vic. No. 40 (W.A.), sec. 24; 62 Vic. No. 38 (N.Z.), sec. 164].

Managers of public roads may make roads over mining works.

Ib. s. 18.

21. It shall be lawful for the Board of Land and Works, or other such body as in the last preceding section mentioned, to authorize any person to make or construct any roads or temporary or permanent ways or other works over across or through any part of such works made or constructed by the holder of a miner's right under the authority of this Part of this Act. Provided that before such board or body shall give such authority seven days' notice thereof shall be given to the person lawfully interested in such last-mentioned works. [cf. 37 Vic. No. 13 (N.S.W.), sec. 30].

Value of buildings held under miner's right or business

22. When any land *bonâ fide* and legally held for residence or business on which any such building or erection as aforesaid may

have been put up shall be about to be sold, such building or erection or other *bonâ fide* improvements that may be made on such land shall, unless such land shall have been surveyed by the Board of Land and Works prior to the erection of such building or erection, be valued ; and for the purpose of ascertaining such value, in case the holder of the miner's right or business licence by virtue of which the land upon which shall be situate such building or erection shall have been occupied or his assigns and the Board of Land and Works shall not agree upon the value, it shall be lawful for the judge of the Court of Mines held at or nearest to the place at which such building or erection shall be situate, on the application of such holder or of the said Board, to make an order that the same shall be valued by some competent person to be appointed in such order and by two other persons, one of whom shall be appointed by the said Board and the other by such holder or his assigns ; and such three arbitrators or any two of them shall make their valuation in writing (so as the amount of such valuation shall not exceed the cost of constructing such building erection or other *bonâ fide* improvements) on or before the day named for that purpose in such order, or on or before such further day as the said judge shall by writing indorsed on the same order appoint.

"Mining Statute 1865," s. 19.
licence to be arbitrated.

See No. 1514, s. 19.

Such order shall be in the form contained in the Fourth Schedule to this Act or to the like effect, and shall be filed in the said Court ; and every such award shall be in the form contained in the Fifth Schedule to this Act or to the like effect and shall be delivered to the said judge in order that such award may be and the same shall be transmitted to and deposited in the office of the said last-mentioned Board. [cf. 62 Vic. No. 38 (N.Z.), sec. 40].

Fourth Schedule.

Fifth Schedule.

23. Upon any valuation under this Part of this Act, each party shall appoint an arbitrator, by delivering to the judge who shall have made the order for valuation an appointment of a person as arbitrator signed by himself or his agent, and shall serve upon the opposite party a copy of such appointment. If either of the parties shall fail so to deliver such appointment and serve such copy, the other party, if he shall not have failed to do so, may serve upon the party who has so failed a copy of the said order for valuation accompanied by a notice requiring him to deliver such appointment to the said judge and a copy thereof to

Proceedings on neglect to appoint an arbitrator.
Ib. s. 20.

"Mining Statute
1865."

the party serving such notice ; and if within fourteen days from the service of such copy and notice the party who shall have so failed shall still fail to deliver such appointment and copy, the arbitrator appointed by the party who shall have served such notice shall be deemed to be appointed by and shall act alone on behalf of both parties ; and the valuation of any arbitrator or arbitrators appointed in pursuance of this Part shall be binding final and conclusive upon Her Majesty and the said holder of the said miner's right or business licence or his assigns to all intents and purposes whatsoever.

Death of
arbitrator.
Ib. s. 21.

24. If before the making of such valuation as aforesaid any arbitrator die or refuse or by absence from Victoria or otherwise become incapable to act, the judge or party by whom such arbitrator shall have been appointed (as the case may be) shall appoint in like manner another in his stead ; and if either party fail so to do for the space of fourteen days after notice from the other party in that behalf, the arbitrator appointed by the party giving the notice may proceed alone *ex parte* ; and every arbitrator so appointed shall have the same powers and authorities as were vested in the arbitrator in whose stead the appointment shall be made.

Holder of
miner's right or
business licence
to have the
value.
Ib. s. 22.

25. The value so ascertained of any such building or erection as aforesaid shall be added to the upset price of the land without such building or erection, and shall together therewith be and constitute the actual upset price of such land ; and if the said holder of the said business licence or miner's right shall bid such last-mentioned upset price or more and shall be the highest bidder for such land, the value aforesaid shall be deducted from the sum so bidden and the balance shall be the purchase money for such land ; but if any other person than such holder shall become the purchaser of such land and shall pay for the same, such holder shall be entitled to receive out of such purchase money the said value of such building or erection. [cf. 62 Vic. No. 38 (N.Z.), sec. 40].

Licence to
enter upon
conveyed land.
Ib. s. 23.

26. The Board of Land and Works may grant licences in respect to any stream creek race or drain or any dam or reservoir upon any conveyed land referred to in section four of the *Water Act* 1890 in the same manner as if the same were situated on Crown lands ; the licensee may by the authority of such licence and for the purposes therein expressed enter upon the land so

conveyed, and may cleanse and clear and keep in efficient repair such race drain* dam or reservoir, and may deposit the matter removed therefrom upon the land immediately adjoining such race drain* dam or reservoir to a distance not exceeding five feet therefrom, without making any compensation to the owner of such land.

(4) *Residence Areas (a).*

27. For the purpose of this Subdivision unless the context is inconsistent with such construction—

“Residence area” shall mean any Crown land on any gold-field not exceeding one acre in extent occupied for the time being (in accordance with the provisions of this Part of this Act and of the by-laws of the mining district) by the holder of any miner’s right or business licence for the purpose of residence or residence and carrying on business as the case may be; and

“Holder” shall mean the holder of any miner’s right or business licence who is for the time being entitled to occupy any residence area. [cf. 62 Vic. No. 24 (Q.), sec. 71; 56 & 57 Vic. No. 587 (S.A.), sec. 69; 57 Vic. No. 24 (Tas.), Part 11 (4); 62 Vic. No. 38 (N.Z.), sec. 117].

28. No person shall be entitled to occupy any land on any gold-field as a “residence area” unless such area shall for the time being be registered by the mining registrar or other proper officer of the mining district in which such land is situate, and unless such person shall be registered as the holder of such area and the number of the miner’s right or business licence by virtue of which he is entitled to occupy such area is also registered. [cf. 59 Vic. No. 40 (W.A.), reg. 41].

29. Any person may be the holder at any one and the same time of not more than one residence area in addition to the resi-

(a) cf. 62 Vic. No. 38 (N.Z.), sec. 117, *et seq.*; 63 Vic. No. 29 (N.Z.), *ib. s. 4.*
 sec. 5; 59 Vic. No. 40 (W.A.), secs. 9, 16, 27-31; 56 & 57 Vic. No. 587 (S.A.), secs. 33 (ii), 69; 62 Vic. No. 24 (Q.), secs. 15 (5), (6), 17; 37 Vic. No. 13 (N.S.W.), sec. 15 (1); 57 Vic. No. 24 (Tas.), secs. 28, 30.

“Mining Statute 1865.”
 Sec No. 1514, s.12.

Interpretation.
 “The Residence Areas Act 1881,”
 s. 2.

“The Residence Areas Act 1884,”
 s. 2.

Registration of residence area.
 “The Residence Areas Act 1881,”
 s. 3.

See sec. 5.
 See No. 1514, ss. 14, 17, 28.

Limitation of number of residence areas to be held by one person.

See ante, sec. 5.

"*The Residence Areas Act 1881.*"

dence area on which he may actually reside or on which he may reside and carry on his business, but no person shall be the holder of a residence area situated within a distance of ten miles from any other residence area held by him.

A separate miner's right or business licence shall be held for each residence area of which any person may be the holder.

Notification of registration to be indorsed on miner's right.

Ib. s. 5.

30. A notification of the fact of the registration of any residence area registered after the coming into operation of this Act shall be indorsed by the mining registrar or other officer on the miner's right or business licence by virtue of which such area is held, and a similar indorsement shall be made by the registrar upon any renewal of such right or licence.

Holders of residence areas registered as such before 31st March, 1882, entitled to certain privileges.

Ib. s. 6.

31. Every holder of a miner's right or business licence who was entitled to occupy and did occupy either by himself or his agent any Crown lands on any gold-field for the purpose of residence or of residence and carrying on his business and who at the time of the passing of "*The Residence Areas Act 1881*" was registered or before the thirty-first day of March One thousand eight hundred and eighty-two was registered as the holder of such area shall be entitled to all the rights and privileges by this Subdivision conferred on holders of residence areas who have resided thereon for a period of at least twelve months.

Persons in undisturbed occupation for twelve months before commencement of Act No. 709.

Provided that any person who has been in undisturbed occupation by himself or his agent of any residence area for twelve months prior to the coming into operation of the said Act shall be deemed to be a person entitled to occupy within the meaning of this section.

Cancellation of registration if holder of residence area ceases to have miner's right or business licence or has illegally obtained registration.

Ib. s. 7.

See No. 1514, ss. 15, 16.

32. If at any time after the registration of a residence area it shall be proved to the satisfaction of any warden that the person who is registered as the holder thereof is no longer the holder of a miner's right or business licence as the case may be or that such person has obtained such registration in contravention of any of the provisions of this Part of this Act or of any by-laws of the mining district in which such area is situate such warden shall in any such case make an order that the registration of such residence area be cancelled; and such registration shall thereupon be cancelled by the mining registrar or other proper officer, and the

land so registered shall on such cancellation cease to be a residence area. [cf. 59 Vic. No. 40 (W.A.), reg. 51].

"The Residence Areas Act 1881."

33. If at any time after four months from the registration of a residence area it shall be proved to the satisfaction of any warden that there is no habitable dwelling thereon erected and that there has not been a habitable dwelling thereon erected for a period of at least three consecutive months, such warden shall make an order that the registration of such residence area be cancelled; and such registration shall thereupon be cancelled by the mining registrar or other proper officer, and the land so registered shall on such cancellation cease to be a residence area, and no second registration shall be effected by the same person of the whole or any part of a residence area within a period of six months.

Order for cancellation of residence area if no dwelling thereon.
Ib. s. 8.
See No. 1514, ss. 15, 16.

34. Every order as aforesaid and the decision of any warden whether he will or will not make an order as aforesaid shall be final; and no such order or decision shall be a bar to any fresh suit before any warden; and no order shall in any case be made or refused until a suit claiming an order for the cancellation of the registration of a residence area shall have been commenced before and heard and determined by such warden in accordance with the provisions of Division two of this Part of this Act.

Effect of order.
Ib. s. 9.
When order may be made.

35. The holders of a residence area and the executors or administrators of any deceased holder shall have except as against Her Majesty Her heirs and successors the sole and exclusive right to occupy the surface of such residence area or to take any proceedings that may be necessary to enable him to keep or recover possession of such surface in like manner so far as is consistent with this Part of this Act as if he were the owner of such area in fee simple.

Exclusive right of holder of residence area.
Ib. s. 10.

36. When buildings or other improvements have been erected or made upon any Crown lands occupied by the holder of a miner's right or business licence under the provision of this Subdivision and of which land the holder has been in possession for a period of at least two years and a half, if it be proved to the satisfaction of the Board of Land and Works that such buildings or other improvements have been erected or made and that the holder has been in possession of such lands as aforesaid and that he has complied with the provisions of this Subdivision, and if there be no

Holders of residence areas after possession for two and a half years to have right of pre-emption at a valuation.
"The Residence Areas Act 1884," s. 3.
See No. 1514, ss. 19, 20, 21.

"The Residence Areas Act 1884."

objection to the alienation of such land on the ground of its being auriferous, or other reasons of a public nature to be stated by the Board of Land and Works within three months after being requested to do so by the holder, or within three months after an application has been made to purchase as hereinafter mentioned, the holder shall have the exclusive right of purchasing the allotment on which such buildings or other improvements have been erected or made at a price to be determined by an appraiser appointed by the Board of Land and Works. In the event of the Crown requiring to resume possession for public or other purposes of any residence area, the holder of such area shall be entitled to payment of compensation for the value of his interest in such residence area together with the value of any buildings or other improvements erected or made thereon. Such value shall be ascertained and determined in the same manner as the value of buildings erections and *bonâ fide* improvements made on land held for residence or business is ascertained and determined under the provisions of this Part.

Declaration to be made by appraiser.

Ib. s. 4.

See No. 1514, s. 23.

37. Before any appraiser enters into the consideration of any matters referred to him under the last preceding section, he shall in presence of a justice make and subscribe the following declaration (that is to say):—

I do solemnly and sincerely declare that I have no interest either directly or indirectly in the matters in question, and that I will faithfully and honestly and to the best of my skill and ability make any appraisal and valuation required of me under the provisions of the *Mines Act 1890*.

Holder of a miner's right or business licence may pay for residence area in instalments.

"The Residence Areas Act 1888," s. 2.

38. Any holder of a miner's right or business licence who has under the provisions of this Subdivision the exclusive right to purchase the land occupied by virtue of such miner's right or business licence by him shall be entitled on exercising such right of purchase to pay the amount of the purchase money in ten annual instalments of equal amount.

Power to let.

"The Residence Areas Act 1881," s. 11.

39. The holder of a residence area may at any time after he has resided thereon for a period of at least twelve months let his interest in the occupation of the surface thereof to any person at a monthly or weekly rental, and between such holder and such

person there shall exist the same rights as between any landlord and his tenant. “The Residence Areas Act 1881.”

40. The holder of a residence area may at any time after he has resided thereon for a period of at least twelve months sell or transfer his interest in the occupation of the surface of such area to any other holder of a miner's right or business licence. Power to sell or transfer. *Ib. s. 12.*

41. No such sale or transfer shall have any force or effect until the fact of such transfer or sale shall be registered by the said mining registrar or other proper officer, and the area shall be registered in the name of the person to whom it shall be so sold or transferred, and such person's right or licence as the case may be shall be indorsed as hereinbefore provided, and such person shall thenceforth be and be deemed to be the holder of such residence area. Sale or transfer void until registered. *Ib. s. 13.*

42. In the case of the death of the holder of a residence area before he shall have resided thereon for a period of twelve months, it shall be lawful for the executors or administrators of such deceased holder to sell transfer or let the interest in the occupation of the surface of such area notwithstanding the deceased holder may not have resided for at least twelve months thereon. Provided always that every such sale or transfer shall be in accordance with the provisions of the preceding sections. Residence unnecessary in certain cases. *Ib. s. 14.*

43. Every residence area shall be and the same is hereby exempted from occupation for mining purposes under any miner's right. Nevertheless the Governor in Council may from time to time temporarily exempt from the operation of this section any portion of a mining district in which there shall be a new discovery of gold and such temporary reservation may by the Governor in Council be revoked. And in the case of such exemption no person shall mine under any such area until he shall have deposited with the warden such reasonable sum as the warden may assess as compensation to the holder of such residence area; and such sum or any part thereof shall be paid to such holder or otherwise dealt with as the warden shall direct. Exemption from mining under right. *Ib. s. 15.* See No. 1514, s. 24.

Nothing in this section or in section forty-seven shall affect the right of any person or company holding a claim under a miner's right on the first day of April One thousand eight hundred and eighty-two to mine under any residence area that may previously Claims under residence areas before commencement of Act not affected.

"*The Residence Areas Act 1881.*" to such date have been taken up as a residence area on the surface of such claim so held under a miner's right.

Leases below residence areas.

Ib. s. 16.

See No. 1514, s. 19.

°No. 1514, s. 18.

44. It shall be lawful for the Governor in the name and on behalf of Her Majesty to grant to any person or to any elective body corporate a gold mining lease or mineral lease to be effectual below the surface of a residence area at such a distance below such surface as shall be not less than one hundred* feet and as shall in the opinion of the Governor in Council not endanger the safety of the buildings erected on such area. Provided always that any such lease shall contain a covenant on the part of any such lessee to make good any subsidence caused by mining under any residence area. [cf. 62 Vic. No. 24 (Q.), sec. 46].

Provisions of lease.

Ib. s. 17.

45. Every such lease shall be issued in accordance with and shall be subject to the provisions of this Part of this Act and the regulations thereunder, and shall so far as relates to any residence area confer on the lessee only such powers or authorities as can be actually or reasonably exercised below such distance from the surface of such area as shall be specified in such lease.

Validity of leases heretofore granted below surface of residence areas.

Ib. s. 18.

See No. 1514, s. 19.

46. Every lease granted previously to the first day of April One thousand eight hundred and eighty-two conferring on any person a right to mine below the surface of any Crown land occupied as a residence area by the holder of a miner's right or business licence shall be and be deemed to have been from the time of the granting thereof as valid and effectual in all respects (and as well against the holder of such miner's right or business licence as against any other person) as if such lease had been granted with the consent of the holder of such miner's right or business licence as the case may be, anything in section forty-nine of this Act to the contrary notwithstanding.

Penalty for mining beneath residence area without a lease.

Ib. s. 19.

47. Any person not being the holder either of a lease under this Subdivision or of a lease heretofore granted and validated by "*The Residence Areas Act 1881*" who shall mine or employ any other person to mine under any residence area shall be liable on conviction thereof to a penalty not exceeding Five hundred pounds.

Disputes as to rights below surface to be heard and finally determined before warden.

Ib. s. 21.

°No. 1514, s. 18.

48. All disputes between the holder of a residence area the tenant of same the Crown grantee of same when sold limited in depth* or his assigns the executor or administrator of any of them and any person who has a right derived from any gold mining or

mineral lease to mine at a fixed distance below the surface of any such residence area shall be commenced heard and finally determined before a warden in accordance with the provisions of Division two of this Part of this Act.

(5) *Mining Leases (a).*

49. It shall be lawful for the Governor in the name and on behalf of Her Majesty to grant to any person or to any elective body corporate, subject to the provisions of this Part of this Act and (except where on the granting of any particular lease the term or the rent or royalty or the quantity or the form of the land or the covenants conditions reservations and exceptions to be contained in the lease shall be specially prescribed as hereinafter authorized) to the regulations to be made as hereinafter mentioned, a lease to be effectual on, or below, or both on and below, the surface of any Crown land not demised under the provisions of any Act heretofore or to be hereafter in force and not occupied by the holder of a miner's right or business licence unless with the consent of such holder, for the purpose of mining thereon or therein for gold or for any metal or mineral other than gold, or of cutting and constructing thereon races drains dams reservoirs or tramways to be used in connexion with any such mining, or of erecting thereon any buildings and machinery to be used either for washing smelting crushing or obtaining any gold metal or mineral or any earth containing any gold metal or mineral, or for pumping or raising water from any land mined or intended to be mined upon for any such gold metal or mineral, or for any or all of those purposes and also for the purposes of residence in connexion with any of such purposes.

Leases may be granted for mining &c.
 "Mining Statute 1865," s. 24.
 See No. 1514, ss. 25, 26.

50. The words "elective body corporate" in the last preceding section shall be deemed to mean and from the time of the coming into operation of the "Mining Statute 1865" to have meant any partnership association company or body corporate registered under the provisions of any Act now or heretofore in force relating to the limitation of the liability of mining partnerships associations or companies or of the shareholders therein.

Meaning of words "elective body corporate."
 Act No. 372, s. 2.

(a) Cf. 37 Vic. No. 13 (N.S.W.), sec. 33; 62 Vic. No. 24 (Q.), sec. 24; 56 & 57 Vic. No. 587 (S.A.), sec. 51; 57 Vic. No. 24 (Tas.), sec. 34; 59 Vic. No. 40 (W.A.), sec. 32; 62 Vic. No. 38 (N.Z.), Part IV.

"Mining Statute 1865," s. 25.
Leases to be called "Gold Mining Leases" and "Mineral Leases."

51. All such leases granted for the purpose of mining for gold or for any of the purposes aforesaid connected with such mining shall be called "Gold Mining Leases;" and all such leases, granted for the purpose of mining for any metal or mineral other than gold or for any of the purposes aforesaid connected with such last-mentioned mining shall be called "Mineral Leases."

Land occupied for residence or business may be leased on compensation being paid.

Id. s. 26.

52. Any such lease may be made of any land occupied for the purpose of residence by the holder of a miner's right or business licence under the provisions aforesaid, if the person applying for the lease shall make compensation to such holder for any building erected or other improvements made by him or any person under whom he derives title on such land; the amount of such compensation to be determined in the manner prescribed by the regulations aforesaid or such other regulations respectively as shall for the time being be in force in Victoria relating to such leases. [cf. 37 Vic. No. 13 (N.S.W.), sec. 34; 56 & 57 Vic. No. 587 (S.A.), sec. 51 (2)].

Leases of mines under lands granted or reserved for public purposes may in certain cases be made.

Act No. 446, s. 30.

53. [Repealed and re-enacted by No. 1514, sec. 27]:—53. The Governor in Council in the name and on behalf of Her Majesty upon application made to him for that purpose may grant leases to any person of mines in under or upon lands granted or reserved for railways waterworks public parks places of recreation or other public purposes, subject to such regulations as may be from time to time passed by the Governor in Council for that purpose and with the consent of the Board of Land and Works or the Victorian Railways Commissioner in whom the said lands are vested. [cf. 37 Vic. No. 13 (N.S.W.), sec. 34; 62 Vic. No. 24 (Q.), sec. 46; 59 Vic. No. 40 (W.A.), sec. 33].

Term and rent of gold mining leases.

"The Mining Act 1885," s. 2.

Area and term of mineral lease.

54. [Repealed and re-enacted by No. 1514, sec. 28]:—54. (1) In the case of a gold mining lease the term for which the same may be granted shall not exceed fifteen years from the time of granting the same, and the yearly rent to be payable in respect thereof shall be Two shillings and sixpence for every acre demised.

(2) In the case of a mineral lease the extent of the area thereof shall not exceed six hundred and forty acres and the term for which the same may be granted shall not exceed fifteen years from the time of granting the same, and the yearly rent to be

payable in respect thereof shall be at such rate not being less than One shilling nor more than One pound for every acre demised, and so on in proportion for any less quantity, as the Minister may determine. [cf. 37 Vic. No. 13 (N.S.W.), secs. 36, 37 ; 62 Vic. No. 24 (Q.), sec. 26 ; 56 & 57 Vic. No. 587 (S.A.), sec. 51 ; 57 Vic. No. 24 (Tas.), sec. 39 ; 59 Vic. No. 40 (W.A.), secs. 34, 35].

"Mining Statute 1865."

55. Any holder of a miner's right, desirous to prospect for gold in any place where sinking through basalt will be necessary and to which no part of any gold workings shall be nearer than five miles, may mark off at such place an area of one square mile for the purpose of such prospecting : and in case such person shall discover in any part of such area gold in quantities which the Governor in Council shall consider remunerative, it shall be lawful for the Governor in the name and on behalf of Her Majesty to grant to such person a lease not exceeding one hundred acres, to be selected by such person in any part of such area (whether the same or any portion thereof shall have been occupied by the holder of a miner's right or business licence or not) in one lot for such term as the Governor in Council shall determine at a nominal rent ; and every such lease shall in all other respects be subject to the provisions of this Part of this Act, and to any regulation made in pursuance thereof in regard to gold mining leases. [cf. 56 & 57 Vic. No. 587 (S.A.), Part VI ; 57 Vic. No. 24 (Tas.), sec. 21 ; 59 Vic. No. 40 (W.A.), sec. 26].

Governor may grant special leases to discoverers of new gold-fields.
Ib. s. 28.

56. Any person holding a lease under the provisions hereinbefore contained or under the provisions of any Act authorizing the granting of leases for mining purposes, and the executors administrators or assigns of any such person, shall be entitled at any time with the consent of the Governor in Council to surrender the same.

Leases may be surrendered.
Ib. s. 29.

It shall be lawful for the Governor in the name and on the behalf aforesaid to grant to such person a lease, for any term not exceeding in the case of a gold mining lease fifteen years and in the case of a mineral lease thirty years, of the whole or any part of the land demised by such surrendered lease ; and any such new lease may with the like consent be renewed from time to time for any period not exceeding fifteen or thirty years (as the case may be) at each renewal.

Renewal of leases.

"Mining Statute
1865."

Provided that such new lease shall be at the rent which shall then be chargeable by law in respect of a gold mining or mineral lease according as such new lease shall be the one or the other, and shall be subject to the covenants and conditions prescribed by the regulations which shall at the time of the granting thereof be in force and applicable to the particular lease required or such other covenants and conditions as to the Governor in Council shall seem fit. Provided further that before any such new lease shall be granted, the person intended to be the lessee shall pay such fine not exceeding ten pounds as the Governor in Council shall direct. [cf. 37 Vic. No. 13 (N.S.W.), sec. 54; 56 & 57 Vic. No. 587 (S.A.), sec. 101; 62 Vic. No. 24 (Q.), sec. 44; 59 Vic. No. 40 (W.A.), sec. 41].

Rent reserved in
existing leases
under Act No.
291 reduced.

"The Mining
Act 1885," s. 4.

57. In the case of every gold mining lease issued under the "Mining Statute 1865" previously to the eighteenth day of December One thousand eight hundred and eighty-five the rent reserved shall from and after the said date be deemed to be at the rate of five shillings for every acre demised; and every such lease shall so far only as regards any rent accruing due after the said date be read as if rent at the rate of five shillings for every acre had been thereby reserved in lieu of the rent therein mentioned.

Rents payable on
leases heretofore
granted.

"Mining Statute
1865," s. 30.

58. No person holding a lease granted under the provisions of any of the Acts repealed by the "Mining Statute 1865" authorizing the granting of mining leases shall after the coming into operation of the said lastmentioned Act be required, notwithstanding any covenants therein contained, to pay any greater sum by way of rent for the land thereby demised than at the rate of one pound an acre.

(6) *Leases of Reservoirs.*

Leases may be
made of
reservoirs.
Ib. s. 31.

59. It shall be lawful for the Governor in the name and on behalf of Her Majesty to grant to any person, subject to the provisions of this Part of this Act and to the regulations hereinafter mentioned, a lease of any water reservoir constructed at the public expense. Provided also that it shall be lawful for the Governor in the name and on the behalf of Her Majesty to make such lease or grant to any elective body corporate at such rent and for such term as the Governor in Council shall think fit. Provided further

that, notwithstanding any such regulation, it shall be lawful for the Governor in Council at the time of the granting of any such lease to fix specially the rent terms covenants and conditions upon which the same shall be granted.

60. Her Majesty or the owner of any such lease as in the last preceding section mentioned may recover in a summary way before a justice any sum of money due in respect of any water supplied from any such reservoir.

"Mining Statute 1865."

Money due for water supplied may be recovered in a summary manner.

Ib. s. 32.

61. Any person wrongfully taking water from any such reservoir or from any race supplied therefrom shall be liable for the first offence to a penalty not exceeding Five pounds or to imprisonment for a period not exceeding one month; and for any subsequent offence to a penalty not exceeding Twenty pounds or to imprisonment for a period not exceeding three months.

Penalty for wrongfully taking water.

Ib. s. 33.

62. Any person who shall by wilfully suffering sludge or other noxious matter to flow into, or who shall otherwise pollute the water in any such reservoir (whether demised or not) or in any race flowing into or out of the same, or shall injure the banks of any such reservoir or race or otherwise damage the same respectively or the works connected therewith, shall be liable for every such offence to a penalty not exceeding Five pounds; and shall also pay to Her Majesty or the lessee of such reservoir or race such sum as shall be proved to the satisfaction of the justice before whom such person shall be convicted to be a proper compensation for the damage sustained by such polluting injuring or damaging; and the said justice shall order the said sum to be paid accordingly.

Penalty for polluting water or injuring reservoir.

Ib. s. 34.

(7) *Licences to Search for Metals and Minerals other than Gold.*

63. It shall be lawful for the Governor in Council or any person authorized by him in that behalf to grant to any person, subject to the provisions of this Part of this Act and to the regulations hereinafter mentioned, a licence to enter upon any Crown land not demised under the provisions of any Act heretofore or to be hereafter in force and not occupied by the holder of a miner's right or business licence unless with the consent of such holder for the purpose of searching for any metal or mineral other than gold. Provided that notwithstanding any such regulation it shall

Licences to search for metals and minerals other than gold may be granted.

Ib. s. 35.

“*Mining Statute* 1865.” be lawful for the Governor in Council at the time of the granting of any such licence to fix specially the fee rent or royalty to be paid in respect thereof and the conditions upon which the same shall be granted.

(8) *Licences to cut Races &c.*

Licences to cut and construct races dams &c. may be granted. *Ib.* s. 36. *

64. It shall be lawful for the Governor in Council to grant to any person for any term not exceeding fifteen years, subject to the provisions of this Part of this Act and to the regulations hereinafter mentioned, a licence which shall authorize such person his executors administrators and assigns (except as against Her Majesty)—

to cut construct and use races drains dams and reservoirs through and upon any Crown lands or any land alienated from the Crown in fee simple on or after the twenty-ninth day of December one thousand eight hundred and eighty four* whether the same shall or shall not have been demised under the provisions of this or any other Act heretofore or hereafter to be in force relating to such leases, as may be granted under this Part or shall or shall not be occupied by virtue of a miner's right or business licence, and

*No. 1514, s. 44.

to deepen widen clean repair or otherwise improve any race drain dam or reservoir cut or constructed through or upon any Crown lands or any land alienated from the Crown in fee simple on or after the twenty-ninth day of December one thousand eight hundred and eighty four,* and

*No. 1514, s. 44.

to take or divert water from any spring lake pool or stream situated or flowing upon or through or bounded by any such Crown lands or any land alienated from the Crown in fee simple on or after the twenty-ninth day of December one thousand eight hundred and eighty four* in such manner as shall be prescribed by such licence and regulations in order to supply water for the purposes of mining for gold or any metal or mineral other than gold

*No. 1514, s. 44.

to such person or any other person who may be engaged in any such mining. “Mining Statute 1865.”

It shall be lawful for the person to whom any such licence shall be granted to take or divert water ; and the right conferred by such licence and the property and interest in any race dam or reservoir cut or constructed by virtue thereof shall be deemed to be a chattel interest. Provided always that if any person to whom any such licence shall be granted shall by virtue thereof enter upon any land demised under the provisions of this or any other such Act as aforesaid now or hereafter to be in force or occupied by virtue of a miner's right or business licence, he shall make compensation for any injury occasioned by such entry and by the cutting and constructing of any races dams or reservoirs upon any such land, the same to be recovered before a warden or a warden and assessors in the manner provided by any Act relating to the administration of justice in mining matters for proceedings before a warden or a warden and assessors for the recovery of a money demand. Provided also that it shall be lawful for the Governor in Council at any time to revoke any licence granted under this or the next preceding section, on payment of compensation to the person entitled to the benefit thereof for any outlay by such person for or in respect of any such searching for metals or minerals or of any such race dam or reservoir, and on paying to him in addition to the amount of such compensation such percentage on such amount not exceeding fifty pounds per centum as shall seem to the Governor in Council just having regard to all the circumstances of the case ; the amount of such compensation to be determined in manner directed by the said last-mentioned regulations. Provided further that it shall be lawful for the owner of any such licence to recover in a summary way before a justice any sum of money due in respect of water supplied under the authority of this section for the purposes of such mining as aforesaid. [cf. 57 Vic. No. 24 (Tas.), Part IV ; 59 Vic. No 40. (W. A.) sec. 32 (b) ; 62 Vic. No. 38 (N.Z.), sec. 91, *et seq.* ; 63 Vic. No. 29 (N.Z.), secs. 7, 104].

Power to revoke licence on making compensation.

See No. 1514. s. 45.

(9) *Miscellaneous Provisions relating to Leases and Licences.*

65. Any applicant for any such lease or licence as hereinbefore mentioned shall mark out the land for the lease of which Ground applied for protected. 1b. s. 37.

“*Mining Statute* or licence in respect of which he shall apply in such manner as shall be prescribed by the regulations relating to the particular lease or licence required.”
1865.”

In case any person who shall not previously have been in lawful occupation of such land shall at any time thereafter, until and unless the application for the lease or licence shall be refused or unless thereto authorized by the Governor in Council, enter upon occupy or in any way interfere with such land, such entry occupation or interference shall be deemed a case of trespass or encroachment within the jurisdiction of the wardens appointed under this Act.

Such applicant may proceed therefor and for any damages in respect of such trespass or encroachment and for the recovery of any gold or other metal or mineral taken by such person out of such land or of the value thereof before any such warden or any such warden and assessors in manner in this Part of this Act provided for proceedings before wardens in cases of trespass or encroachment. Provided always that it shall be necessary for the applicant so proceeding to prove to the satisfaction of such warden or warden and assessors as the case may be that he has complied with the regulations in force and applicable for the time being to the species of lease or licence applied for, so far as such regulations shall have been at the time of such entry occupation or interference capable of being complied with. Provided further that, notwithstanding any decision of a warden, the applicant shall not be entitled to have delivered to him any such gold or other metal or mineral, or to receive payment of or to levy the amount of the value thereof or of any damages assessed and awarded to him, until it shall have been decided to grant his application for the lease or licence ; but such gold or other metal or mineral or such amount or damages shall, until the matter of such application shall be determined, be lodged with the clerk of the warden, and if determined in favour of the applicant shall be delivered or paid to him, and if otherwise to the person from whom the same shall have been recovered. [cf. 37 Vic. No. 13 (N. S.W.), sec. 40 ; 62 Vic. No. 24 (Q.), sec. 40].

Warden may hear objections to granting of lease.

Ib. s. 38.

66. It shall be part of the duties of the wardens appointed under this Act, so far as they are required by any such regulations so to do, to hear receive and examine evidence in relation to the

application for any such lease or licence and the objections thereto, and in all other respects to perform the several duties prescribed for their performance by any such regulations. [cf. regs. under 37 Vic. No. 13 (N.S.W.), cl. 19].

67. Nothing hereinbefore contained shall be construed as rendering it obligatory to grant any such lease or licence to any person applying for the same, notwithstanding that he may have complied with the regulations in force and applicable thereto; but in case his application shall be refused, he shall be informed of the reasons for such refusal; and a lease may be granted notwithstanding that the person applying for the same may not in all respects have complied with such regulations. [cf. regs. under 37 Vic. No. 13 (N.S.W.), cl. 27.]

68. When any land a lease of which shall be applied for shall be or shall comprise the whole or part of land held by the applicant under a miner's right, the interest of such applicant under such right shall in nowise be affected by such application or by the refusal or abandonment or failure in any other way thereof; and if such lease shall be granted the interest held under the miner's right shall merge in the interest held under the lease. [cf. 37 Vic. No. 13 (N.S.W.), sec. 30; 59 Vic. No. 40 (W.A.), sec. 37; 62 Vic. No. 24 (Q.), sec. 38].

69. No such lease or licence shall be granted until after the expiration of seven days* after notice of the intention to grant the same shall have been published in the *Government Gazette* and in some newspaper circulating in the district within which the land sought to be leased shall be situate.

70. Pending any application for a lease or licence under the provisions of this Part of this Act it shall not be lawful to mark out as a claim or include within the boundaries of any claim the land applied for or any part thereof, and no such marking out shall confer any right or title to the said land; and any person who shall enter upon such land for the purpose of marking out the same shall be deemed to have trespassed or encroached thereon within the meaning of section sixty-five of this Act. [cf. regs. under 37 Vic. No. 13 (N.S.W.), cl. 28; 59 Vic. No. 40 (W.A.), sec. 42].

"Mining Statute 1865."

Not obligatory to grant leases. *Ib. s. 39.*

Application for a lease not to affect land of the applicant held under a miner's right.

Ib. s. 40.
See No. 1514, s. 46.

Notice of intention to grant lease or licence to be published in *Gazette*.

Ib. s. 41.
©No. 1514, s. 47.
See No. 1514, s. 58.

Ground applied for under gold mining lease protected pending application. *Act No. 446, s. 3.*
See No. 1514, s. 49.

Act No. 446, s. 4.

Pendency of application defined.

71. [Repealed and re-enacted by No. 1514, sec. 50]:—71. The pendency of an application for a lease or licence shall begin with the marking out of the land by the applicant and shall continue until the Governor grants or refuses the same; provided that the pendency of any application for a lease or licence shall cease if before such grant or refusal the applicant does not proceed with his application and complete the same within such time as may be provided and limited by the regulations relating to mining leases or within such further reasonable time as may upon a written application be permitted in writing by the Minister, and a copy of such permission shall be posted up and kept so posted up on some conspicuous part of such land during the further pendency of such application. [cf. regs. under 37 Vic. No. 13 (N.S.W.), cl. 29].

Entry on land by assignee of claim pending application for lease not a trespass.

Ib. s. 5.

72. Any applicant for a lease of land consisting wholly or in part of a claim may purchase such claim and work the same as a claim pending the application.

73. [Repealed by No. 1514]. See No. 1514, ss. 51, 52, and *Ibid.*, Part III, Div. 3 (1).

Directors prohibited from entering into contract for working on tribute unless authorized.

Ib. s. 7.

74. The directors of a registered company under Part II. of the *Companies Act* 1890 shall not make any contract for working any land on tribute as aforesaid unless they shall have been authorized at a general meeting of the shareholders of such company called for that purpose.

Ejectment may be brought in the Court of Mines.

"Mining Statute 1865," s. 42.

75. In case any lease granted under the authority of this Part of this Act or of any Act authorizing the granting of leases for mining purposes shall be or be liable to be forfeited or determined by any breach of condition or otherwise, or in case the term thereby granted shall have expired, possession of the land demised shall and may be recovered on behalf of Her Majesty in such manner as may be provided by any of the conditions of the lease or (if there be no such condition) it shall be lawful for the Attorney-General on behalf of Her Majesty to bring a suit in the Court of Mines of the district in which the land demised by such lease shall be situate to recover possession of such land; and such suit shall be commenced and carried on as any other suit in the Court of Mines, and the proceedings therein shall be the same, and the judgment therein enforced in like manner, as in the case

of any other suit in the said court. [cf. 62 Vic. No. 24 (Q.), sec. 45]. "Mining Statute 1865."

76. Whenever by any notice inserted before the twenty-ninth day of January One thousand eight hundred and seventy in the *Government Gazette* signed or purporting to be signed by the Minister having for the time being the charge of the mining interests of Victoria, or by the Secretary for Mines, any lease granted under either of the Acts numbered 32 or 148 or under the "*Mining Statute 1865*" shall have been declared void or forfeited, and any person shall, as against the lessees, have, under colour of any authority from the Crown or any of the persons above mentioned, been put into or have obtained possession of the leased land for the purpose of mining thereon, such notice shall be deemed to have been from the date of such its publication conclusive evidence that such lease was and was duly declared to be forfeited at the time mentioned in such notice, and that Her Majesty forthwith thereafter re-entered upon the said land in pursuance of the covenant or proviso for re-entry contained in the said lease, and the land comprised in any lease so declared void shall be deemed to have been from the date of the publication of the *Gazette* containing such notice vacant and unoccupied Crown land capable of being taken possession of and occupied for mining purposes within the meaning of this Part of this Act, and any person who after such insertion shall remain or be in the possession or occupation of the lands comprised in such lease or any part of them under colour of such lease shall be deemed to be in the unauthorized occupation of Crown lands and may be proceeded against accordingly. Provided always that nothing in this section contained shall affect any action suit or proceeding commenced before the second day of November One thousand eight hundred and sixty-nine, but the question involved in any such action suit or proceeding shall be decided as if this section had not been passed. [cf. 59 Vic. No. 40 (W.A.), sec. 48].

Gazette notice of forfeiture of mining leases to be conclusive evidence of forfeiture.
Act No. 354, s. 3.

77. It shall be lawful for the Governor in Council from time to time to make regulations, not being contrary to the provisions of this Part of this Act, prescribing—

Regulations of Governor in Council.
"Mining Statute 1865," s. 43.
See No. 1514, s. 64.

The term for which any lease or licence under this Part is to be held,

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The amount of rent or royalty of the fee to be paid whether in advance or otherwise by the grantee of any such lease or licence,

The quantity and shape of the land to be demised or in respect of which the licence is to be available,

The manner in which persons desirous of having leases or licences granted to them shall mark out the land they apply for,

The mode and time of making and investigating and of determining upon applications for and objections to the granting of leases,

The amount of deposit (if any) to be paid by the applicant and objector respectively as a security for the costs connected with such determination,

The manner of dealing with cases when two or more applications are made for a lease of or licence in respect of the same land or reservoir race or dam,

The form of leases and licences under this Part the covenants conditions reservations and exceptions to be inserted in such leases,

The manner in which leases under the provisions of this Part shall be registered, the fees to be paid upon such registration,

The duties of the persons conducting the same, the conditions upon which licences under this Part shall be issued and the privileges to be enjoyed under them,

The manner in which the amount of compensation to be paid by any lessees or licensees or to any licensee under this Part shall be determined, and

Generally for carrying out the provisions of this Part in respect to such leases and licences; such regulations from time to time to alter add to or rescind.

Such regulations may be applicable either to the whole of Victoria or any part thereof, or to any particular description of land or mode of mining. Provided that the regulations now subsisting and made under any Act in force in Victoria before the

commencement of the "*Mining Statute 1865*" relating to the granting of leases for gold mining purposes or for mining for any metal or mineral other than gold or to the granting of licences for cutting constructing and using races dams and reservoirs or for searching for any metal or mineral other than gold shall be deemed to be regulations made under the powers hereby given, but otherwise shall continue in force and effect as if the "*Mining Statute 1865*" or this Act had not been passed; and nothing herein contained shall in any manner prejudice or affect any right title or interest liability or obligation existing at the commencement of the "*Mining Statute 1865*." Provided also that no such alteration variation addition or rescission shall, unless it shall be expressly so declared, affect in any manner any right title or interest obtained or liability or obligation incurred under any regulations existing previously to such alteration addition or rescission. [cf. 37 Vic. No. 13 (N.S.W.), sec. 61; 59 Vic. No. 40 (W.A.), sec. 99; 62 Vic. No. 28 (N.Z.), sec. 302; 62 Vic. No. 24 (Q.), Part XIV, sec. 247; 56 & 57 Vic. No. 587 (S.A.), Part VII, sec. 92; 57 Vic. No. 24 (Tas.), Part XIII, sec. 170].

78. No such regulation, nor any regulation framed under the powers in that behalf given by this Division of this Part of this Act, nor any alteration variation addition to or rescission thereof, shall have any force or efficacy until twenty-one days after it shall have been published in the *Government Gazette*; and every such regulation alteration variation addition or rescission shall be laid before both Houses of Parliament within fourteen days after the making thereof respectively if Parliament be then sitting, and if Parliament be not then sitting then within fourteen days after the then next meeting of Parliament. [cf. 37 Vic. No. 13 (N.S.W.), sec. 144].

Regulations to be published in the *Gazette*.

Ib. s. 44.

79. It shall be lawful for the Governor in Council, notwithstanding any such regulation but subject to the limitations aforesaid, to prescribe on the occasion of the granting of any particular lease (whether gold mining or mineral) the term for and the rent or royalty or both at which the same shall be granted, and the quantity and form of land to be comprised therein, and the covenants conditions reservations and exceptions to be contained in the same; but every such lease (whether under the provisions of this section or otherwise under this Part of this Act) shall contain

Special terms and conditions.

Ib. s. 45.

"*Mining Statute* 1865." a condition that if the lessee his executors administrators and assigns fail at any time during the term to fulfil the conditions and terms therein contained or to use the land *bonâ fide* for the purposes for which it shall be demised, the lease shall for any such failure be voidable at the will of the Governor in Council.

(10) *Mining Districts.*

Creation of mining districts and divisions.
Ib. s. 46.

80. It shall be lawful for the Governor in Council from time to time to erect any portion of Victoria into a mining district, and to divide any such district into any number of divisions, and to give to such district and each of such divisions some distinguishing name, and to define the limits and boundaries of, and also again to abolish, any such district and divisions, and from time to time to alter and vary such limits and boundaries, and from time to time to determine the number of members of the mining board of each district which shall be elected within and for every such division; and until the Governor in Council shall otherwise order, the several mining districts and divisions created under the Act No. 32 or the "*Mining Statute* 1865" and which shall be in existence at the time of the commencement of this Act shall be and shall be deemed to be mining districts and divisions under this Act. Provided always that no more than seven such districts shall be erected under this Act, unless addresses praying for a greater number shall be presented to the Governor by the Legislative Council and Legislative Assembly. [cf. 37 Vic. No. 13 (N.S.W.), sec. 9].

(11) *Mining Officers.*

Power to the Governor in Council to appoint mining officers.
Ib. s. 47.

81. It shall be lawful for the Governor in Council subject to the provisions of the *Public Service Act* 1890 from time to time to appoint such and so many officers and clerks and assistants to such officers and for such mining districts and divisions and places as to such Governor in Council shall seem right for the making of inspection and surveys and registration of claims and mines and for performing such other duties in connexion with mining as the Governor in Council may think fit.

And the Governor in Council shall have authority, by any general regulations or otherwise and in any individual case if it shall be so thought right, to prescribe the powers and duties of

such officers clerks and assistants, and also of any substitute who shall under the powers hereby given be appointed in the place of any officer clerk or assistant who shall be suspended or removed or incapacitated by illness or absence, and the mode of exercising and performing such powers and duties, and the amount of remuneration of such officers clerks and assistants and of any such substitute, and the mode of raising and paying such remuneration, and the time for which the same shall be paid, and whether the same shall be paid partly or in the whole out of the fees to be payable in respect of the services and duties to be by them respectively rendered and performed, and what fees shall be so payable. [cf. 56 & 57 Vic. No. 587 (S.A.), sec. 15 ; 62 Vic. No. 38 (N.Z.), sec. 12].

82. It shall be lawful for the Governor in Council, if it shall seem right to such Governor so to do, to suspend or remove any such officer clerk or assistant or any substitute appointed under the powers hereby given in the place of any officer clerk or assistant so suspended or removed ; and in such case and also in the case of the illness or the absence either unavoidable or by permission granted by the Minister having for the time being charge of the mining interests of Victoria (and which permission such Minister is empowered when he shall think proper so to do to grant) of any such officer clerk or assistant or of any substitute appointed under the powers hereby given in the place of any officer clerk or assistant so incapacitated by illness or absence, to appoint a fit person to act in the place of any such officer clerk assistant or substitute so suspended removed or incapacitated during such suspension illness or absence or otherwise as to the Governor in Council shall seem fit.

Officers &c. may be suspended or removed.
Ib. s. 43.

83. A copy of any registry or entry made by any such officer in any of the books directed by any such regulations as aforesaid to be kept by him, certified by such registrar and signed by him with his name and official character, shall in all cases be *prima facie* evidence of the fact of such entry in such book and of the truth of the matters thereby stated.

Copies of entries to be evidence.
Ib. s. 49.

(12) *Mining Boards (a).*

84. Within and for every such district as aforesaid there shall

Mining board constituted.

(a) See No. 1514, Part I, sub. 7.

“Mining Statute 1865,” s. 50.
See No. 1514,
s. 62.

be a mining board, which shall consist of ten members to be elected as hereinafter mentioned ; and such board shall meet for the despatch of business at such place or places within the said district as the Governor in Council shall appoint. Provided that the mining board existing at the time of the commencement of this Act in and for each mining district then existing shall be deemed the mining board for that district elected under this Act and shall continue to be such mining Board until the first election under this Act of members of the mining board of such district shall take place ; and the mining board mentioned in the sixty-ninth section of *“The Land Act 1862”* shall be taken to mean and include a mining board constituted under this Act. [cf. 37 Vic. No. 13 (N.S.W.), sec. 65.]

Returning officer
and deputies.
Ib. s. 51.

85. Within and for every such district as aforesaid there shall be a returning officer, whom the Governor in Council shall appoint and from time to time may remove. And it shall be lawful for every such returning officer from time to time to appoint by writing under his hand a sufficient number of deputies for the purposes hereinafter mentioned. [cf. 37 Vic. No. 13 (N.S.W.), secs. 65, 66 ; and reg. 7].

Duration of
board.
Ib. s. 52.

86. The chairman of such board shall be elected by and from among the members thereof ; and every member of such board shall continue in office until his successor shall be elected as hereinafter mentioned ; but notwithstanding anything hereinbefore contained, it shall be lawful for any member of the mining board, by writing under his hand addressed to the returning officer, to resign his seat in such board ; and the same shall thereupon become vacant from the time of the receipt of such writing by the said returning officer. [cf. 37 Vic. No. 13 (N.S.W.), sec. 66].

Resignation of
members.

Payment of
members.
Ib. s. 53.

87. There shall be paid annually out of the consolidated revenue to every mining board the sum of five hundred pounds by two equal instalments, to be paid respectively at the expiration of six and twelve months after each general election under this Part of this Act ; and such sum shall be apportioned amongst the members of such board according to some scale to be from time to time adopted by the said board and approved by the Treasurer of Victoria for the time being. Provided always

that no person shall be entitled to receive any part of any such instalment, who shall have resigned his seat as a member of the said board, or whose seat at such board shall become vacant under any of the provisions hereof before such instalment shall have become payable. [cf. 37 Vic. No. 13 (N.S.W.), sec. 66 ; and reg. 33].

88. On the last Saturday in the month of February next after the commencement of this Act, and on the corresponding Saturday in every subsequent year four members shall be elected to serve on such board in lieu of the members retiring by rotation ; and within each division there shall be elected the number of members determined as aforesaid ; and whenever any seat in any board shall become vacant in the interval between two elections, a member shall be elected to fill such vacancy within and for the division for which the member whose seat is vacant shall have been elected. The persons appointed or elected to be members of the mining board shall retire annually therefrom in rotation. On the last Saturday in every year four members of the mining board shall retire therefrom. The member or members who shall have been the longest period in such mining board without having been re-elected shall retire ; and in case there shall be an equality of votes between any two members one of whom must retire according to the provisions as aforesaid, or in case such members were elected without a poll being taken, it shall be decided by lot who shall remain and who retire. Provided that any member of the mining board retiring as aforesaid shall, if otherwise qualified, be eligible to be re-elected as a member of such mining Board. [cf. 37 Vic. No. 13 (N.S.W.), secs. 65, 66 ; and regs. 9, 10, 11].

"Mining Statute 1865."

General election to be held yearly.

Ib. s. 54.

Members to retire by rotation.

Eligible for re-election.

89. Every male person of the full age of twenty-one years holding a miner's right or business licence and being a natural born or naturalized subject of the Queen and resident within any such division as last aforesaid shall be, except as is or may be otherwise expressly provided by any law now or hereafter in force, eligible for election as a member of such board, and be entitled to vote at every election for as many members as are then to be returned for such division (a). [cf. 37 Vic. No. 13 (N.S.W.), reg. 3. 4].

Qualification of members and of voters.

Ib. s. 55.

See No. 1514, s. 60.

(a) See 54 Vic. No. 1073 (*Chinese Act 1890*), section 16.

Act No. 890, s. 1.

Qualifications required at mining board elections where candidates or voters claim as holders of miners' rights.

See No. 1514, s. 60.

Notice of election and nomination of candidates.

"Mining Statute 1865," s. 56.

See No. 1514, s. 61.

Mode of proceeding at elections.

Ib. s. 57.

Sixth Schedule.

90. No person shall be eligible for election as a member of a mining board by virtue of holding a miner's right unless he have held a miner's right for and during the three months immediately preceding the last day appointed for the receiving of nominations of candidates ; and no person shall be entitled to vote at any election of a member of any mining board by virtue of holding a miner's right unless he have held a miner's right for and during the three months immediately preceding the day on which the poll commences. [cf. 37 Vic. No. 13 (N.S.W.), reg. 4].

91. One month before any election under this Part of this Act, the returning officer shall give public notice of such election, requiring the names of all candidates and their proposers to be forwarded to him within such time not less than sixteen days from the time of giving such notice as shall be named in such notice ; and any persons desirous of nominating a candidate for any such division shall within the time named in such notice forward to such returning officer in writing the christian and surname of such candidate and the division for which he is proposed ; and such nomination shall be signed by not less than ten persons duly qualified to vote at such election ; and no person shall be capable of being elected at any such election unless he shall have been proposed in the manner above mentioned and his name as a candidate shall have been published twenty-one days before such election in some newspaper circulating in such district. [cf. 37 Vic. No. 13 (N.S.W.), regs. 11, 12].

92. If the number of candidates nominated as aforesaid for any division shall not exceed the number of members to be elected for such division, the returning officer shall declare such candidates to be duly elected and they shall be deemed to be duly elected accordingly ; but if the number of such candidates shall exceed the number of members to be elected for such division, the returning officer shall cause voting papers to be printed with the christian and surnames of all the candidates in full in the form in the Sixth Schedule to this Act, and shall give public notice that a poll will be taken for the election of members on the day appointed for that purpose ; and on that day a poll shall be taken at such places within such division as the Governor in Council shall from time to time direct ; and every poll shall commence at nine o'clock in the forenoon and close at five o'clock in the after-

noon, and shall be taken in such buildings as the returning officer shall select. [cf. 37 Vic. No. 13 (N.S.W.), reg. 13].

93. The returning officer of every such district as aforesaid or one of his deputies shall preside at each polling place for taking the poll within such district or division thereof as the case may be. And every such returning officer and deputy shall have power and authority to maintain and enforce order and keep the peace at any election held by him ; and without any other warrant than this Part of this Act to cause to be arrested and taken before a justice any person reasonably suspected of knowingly and wilfully making a false answer to any of the questions hereinafter set forth, or of personating or attempting to personate any voter, or of attempting to vote more than once at the same election, or who shall cause a disturbance at any election. [cf. 37 Vic. No. 13 (N.S.W.), reg. 8].

Duty and power of returning officer and deputies.
Ib. s. 58.

94. Each candidate shall be entitled to appoint in writing one scrutineer to be present in each polling room ; and such scrutineers and the returning officer or deputy and any electors not exceeding six in number shall alone be permitted at any one time to enter or remain in the polling room without the consent of the returning officer or deputy ; and every returning officer or deputy shall have power to cause any person to be removed who shall obstruct the approaches to any polling room or shall conduct himself in a disorderly manner ; and all constables and peace officers shall aid and assist such returning officer or deputy in the performance of his duty. [cf. 37 Vic. No. 13 (N.S.W.), reg. 15].

Appointment of scrutineers.
Ib. s. 59.

95. The returning officer or deputy in each district shall provide pencils or pens and ink in every polling room for the use of the electors, and also a locked box with a cleft or opening therein capable of receiving the ballot papers ; and such box shall stand on a table opposite the returning officer, who shall keep the key of such box. [cf. 37 Vic. No. 13 (N.S.W.), reg. 16].

The ballot box.
Ib. s. 60.

96. Every elector before voting shall produce his miner's right or business licence to the returning officer or deputy, who shall stamp or otherwise mark the same and shall deliver to such elector a ballot paper with such stamp or mark ; and every such elector shall without leaving the room strike out the names of every candidate for whom he shall not desire to vote ; and in

Voter to produce miner's right.
Ib. s. 61.

“Mining Statute 1865.” case any elector shall be unable to read or write, the returning officer or deputy if required shall in view of such one of the scrutineers as such elector may desire strike out the names of such candidates as such elector may designate; and after such names shall have been so struck out the voting paper shall be deposited in the said box. [cf. 37 Vic. No. 13 (N.S.W.), reg. 17].

And answer questions.

Ib. s. 62.

97. It shall be lawful for any returning officer or deputy or for any one candidate or scrutineer to put to any person tendering his vote the questions following—

(I.) Are you of the age of twenty-one years?

(II.) Are you residing in this division?

(III.) Are you a natural born or naturalized subject of the Queen?

(IV.) Are you the person named in this miner's right? [*or business licence?*]

(v.) Have you already voted at this election?

And no other question shall be put to any person tendering his vote; and no person who shall refuse to answer any such question, or who shall not answer the same to the satisfaction of the returning officer or deputy, or whose miner's right or business licence (as the case may be) shall have thereon when first produced as aforesaid a stamp or mark as aforesaid appearing to have been made or affixed at the same election, shall be permitted to vote. [cf. 37 Vic. No. 13 (N.S.W.), regs. 19, 20].

Ballot papers to be counted and result declared.

Ib. s. 63.

98. Immediately upon the close of the poll the returning officer or deputy at each polling place shall proceed, in the presence of the scrutineers of the candidates, to ascertain the number of votes for each candidate; and every deputy shall immediately afterwards forward the voting papers sealed up together with a list of the total votes for each candidate to the returning officer; and such returning officer shall as soon as conveniently can be after the day of the poll give public notice of the number of votes given to each candidate, and shall declare the candidates who have received the greatest number of votes in each division not exceeding the number to be elected for the same to be duly elected; and if two or more candidates shall have received an

equal number of votes, the returning officer shall have the casting vote. [cf. 37 Vic. No. 13 (N.S.W.) reg. 21]. "Mining Statute 1865."

99. When the proceedings at any election under this Part of this Act shall be interrupted or obstructed at any place by any riot or open violence, the returning officer or deputy shall not finally close the poll, but shall adjourn the taking of the poll at the polling place at which such interruption or obstruction shall have happened to the Monday following; and if necessary, such returning officer or deputy shall further adjourn such poll until such interruption or obstruction shall have ceased, when such returning officer or deputy shall again proceed with the taking of the poll at the place at which the same may have been so interrupted or obstructed. [cf. 37 Vic. No. 13 (N.S.W.), reg. 23]. Proviso in case of riot at the polling. *Ib.* s. 64.

100. If any candidate at any such election or any other person shall directly or indirectly by himself or his agent offer pay or give any money food drink or valuable consideration to induce any person to vote or to abstain from voting at such election, he shall be guilty of a misdemeanour; and the election of any such candidate shall upon any conviction for such offence be null and void. [cf. 37 Vic. No. 13 (N.S.W.), reg. 22]. Bribery and treating. *Ib.* s. 65.

101. Every mining board shall hold its first meeting on the second Tuesday after every general election, and shall have power to adjourn from time to time; but it shall be lawful at all times for the chairman to convene a special meeting of such board, on giving seven days' notice thereof by advertisement in one or more newspapers published or circulating in the district to which he belongs. [cf. 37 Vic. No. 13 (N.S.W.), regs. 24, 25]. Meeting of board. *Ib.* s. 66.

102. At the first meeting of any mining board after any general election and whenever the office of chairman of any such board shall become vacant, the members of such board shall proceed to the election of a chairman; and the member who shall receive the greatest number of votes shall be the chairman of such board; but no member shall be entitled to vote for himself; and in case any two or more members shall receive an equal amount of votes, the chairman shall be selected from such two or more members by lot. [cf. 37 Vic. No. 13 (N.S.W.), reg. 26]. Chairman to be elected. *Ib.* s. 66.

103. Any five of the members elected as aforesaid for any board shall form a quorum; and all questions before the board shall be Quorum and casting vote. *Ib.* s. 68.

“Mining Statute 1865.” determined by the majority of votes. Provided that the chairman shall have no vote unless in case of an equality of votes when he shall have a casting vote ; and provided also that in case a quorum shall not assemble within one half-hour after the time appointed for any meeting or having so assembled shall disperse, the board shall stand adjourned till the next day at the same hour. [cf. 37 Vic. No 13 (N.S.W.), regs. 28, 29].

Seat how vacated.
Ib. s. 60.

104. If any member shall without the permission of the board fail to give his attendance at four consecutive meetings of the board, or shall become insolvent within the meaning of any Act now or hereafter to be in force, or be convicted of felony perjury or any infamous offence, or become insane, his seat shall thereby become vacant. [cf. 37 Vic. No. 13 (N.S.W.), reg. 32].

Deputy chairman.
Ib. s. 70.

105. In case of the absence of the chairman, it shall be lawful for the members present being a quorum to appoint an acting chairman who during such absence may exercise the powers by this Part of this Act vested in the chairman. [cf. 37 Vic. No 13 (N.S.W.), reg 27].

Mining board to make by-laws.
Ib. s. 71.
See No. 1514, s. 59.

106. Every mining board under this Part of this Act, notwithstanding any vacancy therein, shall have power from time to time (but subject to the provisions of this Part of this Act) to make by-laws for the district for which it shall have been elected, or for any one or more division or divisions or part or parts thereof, and to revoke alter and amend the same ; such by-laws not to affect any right interest liability or obligation existing at the time of the making thereof ; and such by-laws may be for any of the following purposes :—

- (I.) For prescribing the mode in which the validity of disputed elections to such boards shall be decided :
- (II.) For regulating their own proceedings :
- (III.) For determining what are to be the dimensions and boundaries and whether to be at the time of the taking possession or otherwise completely or partially defined or not and what the quantity and form and the position with respect to any reef lead or gutter or otherwise of the land which according to the nature of the land or otherwise may be taken possession of

by any person or persons for a claim and the number of claims which any person or any two or more persons in conjunction may take possession of under a miner's right or miners' rights : ^{"Mining Statute 1865."}

- (iv.) For prescribing the manner in which and with what rights and obligations any such claim or any race drain dam or reservoir cut or constructed or any water taken or diverted by virtue of a miner's right shall be taken possession of held used or enjoyed and worked, subject however to any right which may have been obtained under any licence granted under this Part of this Act to cut construct and use races drains dams and reservoirs and to take or divert water :
- (v.) For determining when and whether before or after or partly before and partly after such taking of possession and under and in reference to what circumstances such dimensions boundaries quantity form and position are to be ascertained, and whether and under and in reference to what circumstances and how the same or any of them are or is at any time or from time to time whether before or after such taking of possession to be altered :
- (vi.) For determining whether and under what circumstances the holders of miners' rights who shall by virtue thereof use any water shall have amongst themselves any priority of supply of such water, and if so how or according to what system such priority is to be regulated, and when the events upon the order of priority of which any such priority is to depend shall be deemed to have occurred :
- (vii.) For determining the events on which the title to any land occupied by virtue of a business licence or to any claim race drain dam reservoir or easement enjoyed under a miner's right or to any share in such claim race drain dam reservoir or easement shall become forfeited ; and for imposing any penalty on the happening of any one or more of such events in lieu of any such forfeiture ; and for determining what

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shall constitute exemptions from or suspensions of such forfeiture, and what persons shall be entitled to enforce such forfeiture or penalty, and whether there shall be any order of priority of right in any persons to enforce any such forfeiture or penalty, and if so what shall be such order :

- (VIII.) For limiting the time within which proceedings for any such forfeiture or penalty must be taken :
- (IX.) For determining whether and under what circumstances any person who shall have obtained an adjudication of any such forfeiture shall, as a condition precedent to his obtaining possession of the forfeited land claim race drain dam reservoir or easement, pay to the person as against whom the same shall be adjudged forfeited any sum as compensation for any property on or labour or capital expended upon such land claim race drain dam reservoir or easement ; and for determining the mode in which any such sum shall be ascertained :
- (x.) For determining what shall constitute relinquished abandoned or deserted as distinguished from forfeited claims races drains dams reservoirs easements or land or any share therein, and by what person lawfully competent thereto, and in what mode and under what circumstances it shall be ascertained whether any particular claim race drain dam reservoir easement or land or any share therein is relinquished abandoned or deserted within the meaning so determined ; and whether and under what circumstances any person shall be permitted to relinquish without being liable to any consequences as for the forfeiture of any land occupied under a business licence or any race drain dam reservoir or easement enjoyed under a miner's right or share therein :
- (xi.) For determining the extent and form of land and the sites which may be occupied for the purpose of residence or residence and business under this Part of this Act :

- (XII.) For determining the mode in which any land occupied ^{"Mining Statute 1865."} for residence or business under this Part of this Act or any claim race drain dam reservoir or easement enjoyed under a miner's right or any share or interest therein which may be transferred or encumbered under this Part may be so assigned or any lien or encumbrance thereon created and any such lien or encumbrance assigned or discharged the rights and obligations of any assignee lienee or encumbrancer of or upon any such land claim race drain dam reservoir or easement and the order of priority of any two or more such lienees or encumbrancers :
- (XIII.) For providing for the mode of obtaining and effecting the registry of land occupied under this Part of this Act for residence or business or any claim race drain dam reservoir or easement enjoyed under a miner's right or any share or interest therein or lien or encumbrance thereon, and for the registry of the assignment of any such claim land race drain dam reservoir or easement or of any share or interest therein or lien or encumbrance thereon or of the discharge of any such lien or encumbrance, and for registries of any of such interests in the case of the death insolvency or lunacy of the owners thereof, or of the sale of any of such interests under the decree judgment or order of any court or the decision of a warden, and for imposing on such registries such reasonable fees as may be necessary for the purpose of defraying the expenses thereof :
- (XIV.) For regulating the mode in which the rights and privileges of the owners of claims and of races drains dams reservoirs and easements enjoyed under a miner's right and of land occupied under this Part of this Act for residence or business may be exercised or enjoyed ; and for limiting qualifying or restricting the exercise and enjoyment of such rights and privileges ; and generally for the protection of such owners in the exercise and enjoyment of the rights privileges and interests conferred by this Part :

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- (xv.) For preventing the accumulation and for the effecting the taking away and depositing in some convenient place of the sludge tailings and other waste and refuse matter oozing or flowing from or connected with any land held or occupied under the provisions of this Part of this Act and worked by means of puddling quartz-crushing or other machines and of the water used in such claims and suffered to run to waste; and for the making of such main and branch channels as shall be necessary for the purposes aforesaid; and for preventing the allowance of such oozing flowing and running to waste from one claim into another with or without any condition for payment of money or otherwise:
- (xvi.) For imposing on all such land and machines such reasonable rates periodical or otherwise as shall be necessary for the purposes aforesaid and for the remuneration of the officers which each such board is hereinafter empowered to appoint, for regulating the manner of imposing and collecting such rates, and for disbursing the same for the purposes aforesaid:
- (xvii.) For the protection from injury and destruction whether by design or culpable negligence and from unlawful removal of such machines and of races drains dams and reservoirs enjoyed under miners' rights and of the water therein and of pegs posts fences and notices and of any plant or appliances used for or in connexion with mining; and for the protection from obstruction of such races and dams and of channels drains creeks and rivers used for mining purposes:
- (xviii.) For regulating the mode of construction and materials and strength of embankments of dams and reservoirs enjoyed or to be constructed under miners' rights:
- (xix.) For the constructing and keeping in repair of suitable bridges or other crossings over races channels or drains used for mining purposes cut across roads or thoroughfares or over such races channels or drains over which roads or thoroughfares shall be carried and for making

proper approaches to such bridges or crossings ; and for determining the width of such bridges crossings and approaches : ^{“ Mining Statute 1865.”}

- (xx.) For the making and keeping in repair and for regulating the width and formation of private ways and passages used for mining purposes over claims or races or any Crown lands used or to be used in connexion with mining or business carried on under business licences ; and for regulating and imposing conditions on the right to change the direction of any such way or passage and for the protection of the same from injury or obstruction by the leaving of felled timber or other obstructing or any waste or injurious matter thereon :
- (xxi.) For determining the distance and enforcing the same at which shafts and other mining workings are to be kept from public and private roads ways and passages and from private land dwellings and other buildings :
- (xxii.) For the prevention of nuisances in and about residences or places of business held under a miner's right or business licence, and for the cleansing and keeping cleansed the same :
- (xxiii.) For securing the baling of water from mines so as to prevent injury from such water to any mining workings :
- (xxiv.) For preventing the defiling or wasting of water used for domestic purposes, and for determining whether any and what waterhole spring or other depository of water shall be reserved for domestic use and the mode of such reservation :
- (xxv.) For determining the cases in which Crown lands lawfully and *bonâ fide* used as a yard garden cultivated field or orchard or upon which any house outhouse shed or other building or any artificial dam or reservoir shall be standing as hereinbefore mentioned shall cease to be exempted from occupation for mining purposes, and for prescribing the manner in which compensation

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shall be ascertained and paid to the person or persons holding or using any such lands. [cf. 37 Vic. No. 13 (N.S.W.), sec. 66 ; 62 Vic. No. 24 (Q.), sec. 247 ; 56 & 57 Vic. No. 587 (S.A.), sec. 92 ; 57 Vic. No. 24 (Tas.), sec. 170 ; 59 Vic. No. 40 (W.A.), sec. 99 ; 62 Vic. No. 38 (N.Z.), sec. 302].

By-laws to be
forwarded to
Law Officers.

Ib. s. 72.

Seventh
Schedule.

107. All by-laws made by any mining board may be in the form contained in the Seventh Schedule to this Act ; and shall be signed by the members who concur in making the same and forwarded to the Law Officers of the Crown, who shall if the same be not contrary to law certify and publish the same in the *Government Gazette* ; and at the expiration of twenty-one days next after such publication but not before, by-laws so certified shall have the force of law throughout the district for which such board shall be elected, or throughout such part or division thereof ; and every such by-law when so certified and published shall be unimpeachable in any court of justice. Provided always that nothing in this Part of this Act contained or any by-law made under the provisions hereof shall affect the rights of Her Majesty in any Crown land or the right of voting under this Part, or shall prevent the operation of any by-law made or to be made by any municipal corporation. [cf. 56 & 57 Vic. No 587 (S.A.), sec. 93].

Governor in
Council may
cancel by-laws.

Ib. s. 73.

Eighth
Schedule.

108. If any person shall object to any such by-law, it shall be lawful for such person to insert twice in some newspaper published or circulating in the district of such board a notice in the form contained in the Eighth Schedule to this Act, stating therein the number and date of the by-law and the reasons for objecting to the same ; and every such notice shall be dated on the day of the first insertion thereof as aforesaid ; and the person objecting as aforesaid shall apply to the Law Officers in writing, specifying the title and date of the said newspapers ; and at the time of such application shall forward such newspapers to the Law Officers who, as soon as conveniently may be after the time mentioned in such notice, shall bring such by-law application and newspapers and all objections (if any) to the revocation of such by-law before the Governor in Council ; and it shall thereupon be lawful for the Governor in Council to revoke such by-law ; and every order by which any by-law shall be so

revoked shall be published in the *Government Gazette* and shall take effect from the time of such publication.

"Mining Statute 1865."

109. Every such board shall have power to appoint officers for the inspection of sludge and water channels for the attending to and the carrying out of any such by laws, and for the collection of the rates and charges which may be imposed pursuant to the provisions of any such by-laws, and such officers to remove and dismiss, and to receive security from the persons so appointed for the faithful discharge of their duties. Provided that no member of any mining board shall be appointed to any such office.

Board to appoint certain officers.
Ib. s. 74.

110. If any person shall think himself aggrieved by the value at which his claim land plant or machinery shall be assessed for any rate to be imposed by virtue of any by-law of any mining board, it shall be lawful for him within one month after such rate is made to appeal against such assessment to the justices at the court of petty sessions holden nearest to the place where such claim land plant or machinery shall be situated ; and such justices shall have power to hear and determine the subject-matter of such appeal. Provided that the person so appealing shall give to such mining board notice in writing of his intention to appeal seven clear days before such appeal shall be heard ; and in case of any such appeal, such board shall have power to appoint such person as such board shall think proper to represent it on the hearing of such appeal.

Appeal against rates.
Ib. s. 75.

111. All moneys received as rates or charges under or by virtue of any by-law made by any mining board shall be paid to the clerk of such board, and shall be by him forthwith lodged in such bank as may be fixed by such board ; and no moneys shall be drawn from such bank except by cheques signed by two of the members of such board, one of whom shall be the chairman or acting chairman, and by such clerk.

Moneys to be lodged in bank.
Ib. s. 76.

112. Every mining board shall cause an account to be made out once in every half-year showing the sums received for rates and charges and the mode in which such sums have been expended ; and shall cause such account to be transmitted to the Minister for the time being having charge of the mining interests of Victoria ; and the said mining board shall cause the same to be

Accounts to be published.
Ib. s. 77.

"Mining Statute published in the *Government Gazette* and in some newspaper 1865." published in the mining district for which such board is elected.

Accounts to be certified.
Ib. s. 78.

113. The chairman and the clerk of each board shall certify that such account is to the best of their belief correct; and any chairman or clerk who shall falsely so certify, and also any member of such board who shall authorize or wilfully permit any sums so received to be expended except for the purposes authorized by this Part of this Act, shall be deemed guilty of a misdemeanor.

Fees how recoverable.
Ib. s. 79.

114. All rates and charges payable under or according to any by-law of any mining board shall by the clerk of such board for the time being, and all fees payable under or according to any regulations to be made by the Governor in Council shall by such person as the Governor in Council shall appoint, be recoverable in a summary manner before any justice; which clerk or person as the case may be is hereby authorized to sue for such rates charges or fees in his own name, and as if the same were due to himself; such fees and rates when recovered to be paid as such board or Governor in Council as the case may be shall direct.

DIVISION 2.—COURTS AND PROCEDURE.

(1) *Courts of Mines.*

(a) *General Provisions.*

Court of Mines.
Ib. s. 81.
See No. 1514,
s. 167.

115. Within and for every mining district there shall be a court to be called the Court of Mines; and such court shall be a court of record, and shall be holden at such intervals and at such place or places within such district as the Governor in Council shall from time to time direct before a judge qualified as hereinafter directed. Provided that the Court of Mines which at the time of the commencement of this Act shall be in existence in and for such mining district existing at that time shall be and be deemed a Court of Mines constituted under this Act. [cf. 37 Vic. No. 13 (N.S.W.), sec. 106; 62 Vic. No. 38 (N.Z.), sec. 291].

Appointment and qualification of judges of Courts of Mines.
Ib. s. 83.

116. It shall be lawful for the Governor in Council to appoint for the Court of Mines of each mining district some person who shall be a barrister-at-law of England or Ireland or advocate of Scotland or a practising barrister of the Supreme Court of Victoria

not previously called to the bar in England or Ireland or admitted in the Faculty of Advocates of Scotland of not less than eight years' standing to be the judge before whom shall be holden such court; and no such judge shall during his continuance in such office practise as a barrister-at-law. Provided always that the several persons who at the time of the commencement of this Act shall hold the office of judge of a Court of Mines shall be judges of the Courts of Mines to be holden under this Act, and shall so act without any fresh commission; and in case of the death resignation or removal of any such judge or any other judge appointed under this Act, it shall be lawful for the Governor in Council to appoint some other person qualified as aforesaid to be judge in the stead of the judge who shall have so died resigned or been removed.

"Mining Statute 1865."

Act No. 827, s. 2.

117. It shall be lawful for the Governor in Council at any time to appoint some other person, who shall be a judge appointed under this Act or who shall be qualified as aforesaid, to act as the deputy of any judge appointed under this Act during such period as shall be determined by the Governor in Council.

Deputy judge.

Ib. s. 84.

Every deputy so appointed during the time for which he shall be so appointed shall have all the powers and privileges and authority to perform all the duties of the judge for whom he shall have been so appointed.

In case any judge shall be unable from any cause to attend any court to be holden under this Act at any place within the district for which he shall have been appointed judge, it shall be lawful for the Governor in Council to appoint any person who shall be qualified as aforesaid to act for any period for such judge in any such court; and every person so appointed during the time for which he shall be so appointed shall as to all suits and proceedings in such court have all the powers and privileges and perform all the duties of the judge for whom he shall have been so appointed; and any such deputy judge may hold a court simultaneously with such judge. Provided that any person who shall at the time of the commencement of this Act hold the office of a deputy judge of a Court of Mines shall for the residue of the time for which he shall have been appointed be deemed to be a deputy judge appointed under this Act.

Act No. 446, s. 8.
 Judge of Court
 of Mines may sit
 without
 territorial limits
 of Court.

118. It shall be lawful for any judge or deputy judge of a Court of Mines to sit either in court or in chambers at any place within Victoria, and no judgment rule decree or order of any judge or deputy judge shall be deemed to be void or be liable to be set aside by reason that the same was made without the territorial limits of the court of such judge or deputy judge.

One judge may
 act for another
 judge.
 "Mining Statute
 1865," s. 85.

119. Any judge or deputy judge of a Court of Mines may at the request of any other judge sit either in court or in chambers with or (in case of the illness of such other judge or on any sudden emergency) for such other judge, and without any commission or appointment for the district or place for which he shall be so requested to sit, and in the presence or (in case of such illness or emergency) in the absence of such other judge; and may while so sitting, either conjointly with such judge or alone if sitting for him, exercise all the powers and perform all the duties which such other judge might have exercised or performed alone. Provided that in the event of a difference of opinion between any two judges sitting together, the decision of the judge or deputy judge of the court shall be the decision of the court or of the judge in chambers as the case may be.

Clerks of Court.
Ib. s. 86.

120. Subject to the provisions of the *Public Service Act 1890* for every Court of Mines there shall be a principal clerk and such assistant clerks as the Governor in Council shall from time to time consider necessary; and such clerk and assistant clerks shall respectively perform their duties at such places within the district as the Governor in Council shall from time to time direct, and shall execute their duties under such general and special rules and orders as shall from time to time be made by the judge of the district for which they shall be appointed, subject however to all such general rules as shall from time to time be framed for regulating the proceedings and practice of the Court of Mines as hereinafter provided.

Reference to
 general rules of
 practice &c.

Deputy clerk.
Ib. s. 87.

121. It shall be lawful for the clerk or assistant clerk of any such court with the approval of the judge, or (in case of inability of such clerk or assistant clerk to make such appointment) for the judge to appoint from time to time a deputy to act for him at any time when he shall be prevented by illness or unavoidable absence from acting in such office; and for such clerk or assistant clerk

at his pleasure, or (in case of his inability so to do) for such judge, to remove such deputy ; and such deputy while acting under such appointment shall have the like powers and privileges, and be subject to the like provisions duties and penalties for misbehaviour as if he were the clerk of the said court for the time being.

122. The clerk of each court with such assistant clerks as aforesaid in cases requiring the same shall issue all summonses precepts and warrants and other documents to be used in or in relation to the proceedings in such court ; and shall take charge of and keep an account of all court fees and fines payable or paid into court and of all moneys paid into and out of court ; and shall enter an account of all such fees fines and moneys in ledgers belonging to the court, to be kept by them for that purpose, in such form as the Governor in Council shall direct ; and generally shall do and perform all such other acts and duties as are hereby required to be done and performed by such clerks.

Clerks to issue process and keep accounts.
Ib. s. 88.

123. For every such court there shall be one or more than one bailiff whom the judge in case of inability or misbehaviour may by order under his hand remove ; and every such bailiff may, subject to the restrictions hereinafter contained, by any writing under his hand appoint a sufficient number of able and fit persons, not exceeding such number as shall be from time to time allowed by the judge, to be officers to assist the said bailiff, and at his pleasure dismiss all or any of them and appoint others in their stead ; and every officer so appointed may also be suspended or dismissed by the judge.

Bailiffs.
Ib. s. 89.

124. The said bailiffs or one of them shall, if required by the judge, attend every sitting of the court unless when their or any of their absence shall be allowed for reasonable cause by the judge ; and shall, by themselves respectively or by the officers appointed to assist them as aforesaid, serve all such summonses issued out of the said court as may be delivered to them respectively for service ; and shall execute all the warrants and precepts issued out of the court ; and the said bailiffs, and officers shall in the execution of their duties conform to all such general rules as aforesaid and subject thereunto to the order and direction of the judge.

Bailiffs' duties.
Ib. s. 90.

"Mining Statute
1865," s. 91.
Remuneration
of bailiffs.

125. The said bailiffs shall be entitled to receive from the clerk and retain for their own use for and in respect of such duties as shall have been performed by them or by the officers appointed to assist them all sums of money allowed as hereinafter mentioned in the name of sums payable to the bailiff, out of which they shall provide for the execution of the duties for which such sums are allowed and for the payment of the officers appointed to assist them; and such sums shall be paid by the clerk of the court to the bailiff upon the performance of such duties but not before; and every such bailiff shall be responsible for all the acts and defaults of himself and of the officers appointed to assist him, in like manner as any sheriff in Victoria is responsible for the acts and defaults of himself and his officers.

Part of sums
allowed only
may be paid to
bailiffs.

Ib. s. 92.

126. If in any court the sums allowed to be taken by the bailiffs of the court shall appear to be more than sufficient, it shall be lawful for the Governor in Council to declare that a certain specified part only of such sums shall be paid to them respectively by the clerk; and in that case and so long as such order shall be in force the amount of the residue of such sums shall be accounted for paid and applied in the same manner as all fees payable to such clerk other than the sums allowed to be taken by the said bailiffs.

Clerk and bailiff
to be distinct
and not to
practise in the
Court of Mines.

Ib. s. 93.

127. It shall not be lawful for any clerk of any Court of Mines, or the partner of any such clerk, or any person in the service or employment of such clerk or of his partner, to act as bailiff of such court; or for any bailiff of any such court his partner or clerk, or any person in the service or employment of such bailiff or of his partner, to act as clerk of such court; and no officer of the court shall either by himself or by his partner be directly or indirectly engaged as counsel attorney or agent for any party in any proceeding in the said court.

Clerk and bailiff
to give security.

Ib. s. 94.

128. Every clerk and bailiff of any court shall give security to such extent and in such manner and form as the Governor in Council shall from time to time direct, for the due performance of the duties of his office and for the due accounting for and payment of all moneys received by him in the course of his duty or which he may become liable to pay for any misbehaviour in his office.

129. In every action against a clerk of any such court for any-
 thing done in obedience to any warrant issued by him under this
 Part of this Act, it shall be a sufficient justification for such clerk
 to plead the decree or order of such court or of the judge thereof
 or the certificate of the warden hereinafter provided for and the
 warrant thereupon, without alleging or setting forth the previous
 proceedings or that the matter whereon such decree order or cer-
 tificate was founded was cognizable by or accrued within the
 jurisdiction of such court judge or warden ; and in every action
 against the bailiff of any such court or any officer servant or agent
 of such bailiff or against the keeper of any gaol for anything done
 by such bailiff or by his command or authority or by such keeper
 in obedience to any warrant or precept issued under this Part,
 it shall be sufficient for such bailiff officer servant or agent or for
 such keeper to justify under such warrant alone, without alleging
 that the same was made and issued within the jurisdiction of such
 court and without alleging or setting forth the decree order or
 previous proceedings in the same manner as any sheriff can and
 may justify under writ issued out of the Supreme Court ; and in
 any of the cases aforesaid proof of the matters so alleged shall be
 sufficient evidence in support of such plea.

*“Mining Statute
 1865,” s. 95.
 Defence in
 actions for
 things done
 under this Part.*

130. It shall be lawful for the Governor in Council to direct
 what fees and sums of money shall be taken in the Courts of
 Mines, and from time to time to lessen or increase the same ; and
 in any case in which the demand shall be in the whole or in part
 pecuniary, such fees and sums may be regulated in the whole or
 in part by way of percentage on the amount of the demand ; and
 it shall be lawful for the Governor in Council from time to time
 to appoint, instead of all or any of the fees or sums which may
 from time to time be payable as aforesaid, other fees and sums by
 way of percentage or otherwise and to be payable on such proceed-
 ings under this Part of this Act as the Governor in Council may
 direct.

*Amount of fees
 and sums to be
 fixed by the
 Governor in
 Council.*

Ib. s. 96.

131. The fees and sums of money payable on every proceeding
 shall be paid to the clerks of the several courts, and in the first
 instance by the party on whose behalf such proceeding is to be
 had on or before such proceeding ; and the fees and sums payable
 upon execution or commitment shall be paid into court before or
 at the issue of the warrant of execution or commitment.

*To whom and
 when fees and
 sums are to be
 paid.*

Ib. s. 97.

"Mining Statute
1865," s. 98.
List of fees and
sums to be
exhibited.

132. A table of such fees and sums of money shall be put up in some conspicuous place in the court house, and also in the clerk's office at every place in which such court shall be holden, and at every place at which an assistant clerk's office shall be opened.

Time place and
notice of holding
court.

Ib. s. 99.

133. The judge of each Court of Mines holden under this Part of this Act shall attend and hold such court at such place or places within the district as the Governor in Council shall have directed that such court shall be holden at, and at such times as such judge shall appoint for that purpose so that a court shall be holden in every such place once at least in such interval as the Governor in Council shall in each case direct; and notice of the days on which the court will be holden shall be published in the *Government Gazette*, and be put up in some conspicuous place in the court house and in the office of the clerk of the court at such place; and no other notice thereof shall be needed; and whenever any day so appointed for holding the court shall be altered, notice of such intended alteration and of the time when it is to take effect shall be published in the manner aforesaid, and be put up in some conspicuous place in the court house and in the clerk's office at such place.

Seal of court.

Ib. s. 100.

134. For every court there shall be a seal; and a fac-simile of such seal as shall be kept by the clerk of the court at each place at which such court shall be holden; and all summonses certificates warrants and other process issued by the clerks of the said court shall be sealed or stamped with one of such seals.

(b) *Jurisdiction of Courts.*

Jurisdiction of
Courts of Mines.

Ib. s. 101.

135. Every Court of Mines shall have original jurisdiction to hear and determine all suits cognizable by a court of law or by a court of equity which may arise—

- (1.) Concerning any Crown land which any person shall be or claim to be entitled to take possession of or occupy by virtue of a miner's right or of a lease under any Act authorizing the granting of leases for mining for gold or for any metal or mineral except gold or wherein or whereon any person shall be or claim to be entitled to search for metals or minerals other than gold or to

cut construct or use any race drain dam or reservoir for gold mining purposes by virtue of a miner's right or under any Act authorizing the granting or issuing of licences therefor, and concerning such or any other race drain dam or reservoir which any person shall be or claim to be entitled to hold by virtue of a lease under any Act authorizing the granting of leases of reservoirs, and concerning any share or interest therein respectively and of or in which land race drain dam or reservoir any other person shall be and shall claim under any such miner's right lease or licence to be entitled to be in the occupation or possession or to search for such metals or minerals or to cut construct or use any such race drain dam or reservoir or which he shall be alleged to have abandoned or to have forfeited under some by-law of a mining board, and concerning the title to or possession or enjoyment or recovery thereof by reason of any such abandonment forfeiture or otherwise, and concerning any sum claimed in the nature of mesne profits thereof :

- (II.) Concerning the right which any person shall have or claim to have by virtue of a miner's right or of any such licence as aforesaid to the use and enjoyment or sale of any water to which any other person shall claim to be entitled, and concerning the right which any person shall have or claim to have to any priority of water taken diverted or used or claimed to be taken diverted or used under the provisions of any such Act as against any other person claiming the same :
- (III.) Concerning any encroachment or trespass upon any such land race drain dam or reservoir as aforesaid, and concerning the diversion or abstraction of any water possessed or used under a miner's right or under any such licence as aforesaid of which land race drain dam reservoir or water any person shall be and shall claim to be entitled to be in the occupation possession use or enjoyment for mining purposes, and concerning any unlawful interference therewith or injury thereto whether wilful or by negligence or wrongful omission

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causing damage thereto and whereby mining shall have been hindered or delayed or any machinery on any such land damaged or the supply of water to which any person shall be lawfully entitled shall be lessened, and concerning the unlawful ouster or exclusion of any person from any share or interest in any such land race drain dam reservoir or water, and concerning the damages and compensation for any such encroachment trespass ouster diversion abstraction interference or injury. Provided that the words "mining purposes" in this sub-section shall include the occupation possession use or enjoyment of Crown land under a business licence or for the purpose of residence, and section two hundred and sixteen of this Act conferring upon a warden jurisdiction by reference to this section shall be construed accordingly. [cf. 62 Vic. No. 38 (N.Z.), sec. 5].

Act No. 446, s. 13.

- (iv.) Concerning or out of any contract relating to mining under a miner's right or any such lease or licence as aforesaid or respecting any such land or water as aforesaid or any share or interest therein, and concerning any debt or money due in respect of any such contract :
- (v.) Concerning any gold or metals or minerals other than gold in or to be taken out of any land occupied or held as aforesaid or out of land in which any person shall be entitled to search for any metals or minerals other than gold under any such licence as aforesaid, and concerning or out of any contract relating to such gold metals or minerals or to any money due in respect of the same or relating to any share or interest therein :
- (vi.) Concerning or out of any contract respecting the working or using for mining purposes of any such land race drain dam reservoir or water as aforesaid or otherwise in relation to mining on Crown land under the provisions of any Act conferring a right to do so, and concerning any money due in respect of any such contract :

- (VII.) Concerning or out of any partnership for or in relation ^{"Mining Statute 1805."} to mining in any Crown land held or occupied as aforesaid or for or in relation to the searching for any such metals or minerals, or concerning or out of any partnership in any such land water race drain dam reservoir gold metals or minerals, or concerning or out of any contract for or in connexion therewith or for dissolving in the whole or in part any such partnership or which may arise between tenants in common or joint tenants in and in relation to any such land or water or in any share or interest therein :
- (VIII.) Concerning contributions to calls or to the expense of working or using any such land race drain dam reservoir or water or any share or interest therein :
- (IX.) Concerning or out of any mortgage or assignment by way of security of or charge upon any such land race drain dam reservoir water gold metals or minerals vested in any person whether the holder of a miner's right or not or any share or interest therein or in a partnership therein :
- (X.) Concerning the cancellation and delivery up of instruments relating to contracts respecting or to mortgages or assignments of or to charges or encumbrances upon any such land water race drain reservoir gold or metals or minerals or any share or interest therein or respecting the working thereof for mining purposes or otherwise in relation to mining or respecting the using any such reservoir race drain dam or water or respecting or in connexion with any partnership for mining or in any such land race drain dam reservoir water gold or metals or minerals or respecting the dissolving in the whole or in part of any such partnership :
- (XI.) Concerning boundaries, for the purpose of ascertaining the same between portions of any such land in all cases where such boundaries shall be in dispute or be confused and whether there may exist or not the circumstances required by a court of equity to ground

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a suit for the ascertainment of boundaries ; and the court before which any such suit shall be brought shall ascertain such boundaries by such means as shall be found convenient, and shall decree what the same shall be, and shall make and give all such orders and directions as shall be necessary for the purpose of carrying out such decree :

- (XII.) Generally concerning all questions and disputes cognizable as aforesaid which may arise between miners in relation to mining on Crown lands.

And the jurisdiction hereby given to Courts of Mines shall extend not only to cases where the litigants shall be the parties originally interested in the cause of suit, but to cases where the title of any such litigants shall be derived as assignee or otherwise from or through any of such parties ; and in the exercise of its jurisdiction every Court of Mines may make such decree in the nature of an award as may be just, and without regard to any rule of law affecting the form only of relief or to the practice of any court of law or of equity ; and may, where the same shall be proper, decree the sale of any such land water gold or metals or minerals or share or interest therein or of the property of any such partnership ; and for the purpose of carrying out and enforcing such jurisdiction may exercise all such powers and make all such orders as the Supreme Court could exercise or make for the purpose of carrying out and enforcing the analogous jurisdiction of that court ; and in every case where in any such suit it shall appear that any party is entitled to the possession use or enjoyment of any such land water gold or metals or minerals or share or interest therein and generally in the exercise of its jurisdiction, such court may, on the application of such party or otherwise as shall be right, direct such process by way of warrant in analogy to a writ of possession or restitution or injunction to put into possession or to any other process as used in the Supreme Court in addition to or in substitution for the process provided for by this Part of this Act as the judge in the particular case shall consider necessary to the bailiff of the court ; who shall execute the same accordingly, and who shall possess and be entitled to exercise in the execution thereof, in addition to the powers by this Part especially conferred

upon him, all the powers and authority of the sheriff when acting in execution of the process of the Supreme Court. “Mining Statute 1865.”

136. If all the parties to any suit in any Court of Mines shall, by writing under their hands or under the hands of their respective attorneys or counsel or under the hands of the manager or of the officer managing the company or of so many of the parties as shall make it appear to the judge that the parties so desire, require the judge of the Court to act as arbitrator in the matter of dispute, such judge may so act and may make an award therein, which shall be in the nature and have the effect of and be expressed as a decree in the suit; and such award shall not be subject to question or appeal in any court whatever. Judge if parties so require to act as arbitrator in which case no appeal to lie. *Ib. s. 102.*

137. If in any suit or appeal in the Court of Mines both legal and equitable rights are involved, the judge may adjudicate upon and determine in the same suit both classes of rights, although a decision upon one class of rights only may be sought by the plaintiff. Court may administer both legal and equitable remedies although both not sought in plaintiff. *Ib. s. 103.*

138. It shall be lawful for any assignee executor or administrator to sue and be sued in any court holden under this Part of this Act or before a warden, or to take proceedings by way of appeal or otherwise under this Part, in like manner as if he were a party in his own right; and it shall be lawful for any person under the age of twenty-one years to sue or to be sued in any court holden under this Part or before a warden or to take proceedings by way of appeal or otherwise under this Part in the same manner as if he were of full age; and no privilege shall be allowed to any attorney solicitor or other person to exempt him from the provisions of this Part. Minors and representatives may sue. *Ib. s. 104.*

(c) *Proceedings in the Courts of Mines.*

139. Every suit in a court of mines shall be commenced by a plaintiff in writing; and may, with the leave of the judge obtained on an *ex parte* application after the plaintiff shall be sealed as hereinafter directed, be prosecuted with written pleadings, but without such leave shall be prosecuted without written pleadings; and every such plaintiff shall state in which of the said modes the suit is to be prosecuted, and shall be entitled of the court in which the suit shall be brought and of the day and year on which the summons indorsed thereon as hereinafter required shall be sealed as hereinafter directed. Mode of commencing suits. *Ib. s. 105.*

"Mining Statute
1865," s. 106.
Form of plaint.
Ninth Schedule.

140. Every plaint shall be in the form in the Ninth Schedule to this Act, and shall state the names and last known places of abode of the parties so far as the same shall be known to the plaintiff, and set forth as briefly as shall be consistent with clearness a statement of the facts upon which the plaintiff shall rely, and (if he shall be so advised) of his answer to any anticipated defence on the part of the defendant; such statement to be divided into paragraphs numbered consecutively, and each containing as nearly as may be a distinct allegation; and every such plaint shall pray for the relief to which the plaintiff shall conceive himself entitled, and shall state the amount sought to be recovered so far as the demand shall be pecuniary.

Persons suing on
behalf of
themselves and
others.
Ib. s. 107.

141. The rules adopted in the Supreme Court permitting in certain cases some persons to sue and be sued on behalf of themselves and others shall in the like cases in the Courts of Mines be adopted in those courts; and in such case the form aforesaid shall be altered and adapted to that mode of suit.

Map may be
annexed to
plaint.
Ib. s. 108.

142. In case the plaintiff in any such suit shall consider that for the purpose of making the statements in any such plaint more clear it would be useful that one or more than one map or plan should be annexed to the said plaint and referred to thereby, such plaintiff may cause the same to be so annexed and may refer thereto by such plaint, and the same shall be taken as part of the said plaint; and in estimating the costs of the suit a reasonable sum shall be allowed for the expense of every such map or plan, unless the judge shall consider that the same was unnecessary.

Summons to be
indorsed on
plaint.
Ib. s. 109.

143. On every such plaint there shall be indorsed in writing a summons directed to the defendant or defendants by name or names, which summons shall state whether the plaintiff or plaintiffs is or are proceeding in person or by attorney; and every such summons shall in the case of a suit to be prosecuted without written pleadings be in the form in the Tenth Schedule to this Act, and shall require the defendant to appear in the Court of Mines at the place where the summons shall be sealed as hereinafter directed, and on the day on which the court shall first sit at that place next after the expiration of fifteen days from the day of the service of such summons, to answer the said plaint; and every such summons shall in the case of a suit to be prose-

Tenth Schedule.

cuted with written pleadings be in the form in the Eleventh Schedule to this Act, and shall require the defendant within such number of days after service on him of such summons as shall be directed by any such general rules as aforesaid to deliver an answer to the plaint of the plaintiffs.

"Mining Statute 1865,"
Eleventh
Schedule.

144. Every summons so indorsed shall be signed by the clerk of the court for the place at which such suit is to be heard, and shall be sealed by him with the seal of such court and dated of the day of such sealing ; and the plaint upon which the summons so sealed shall have been indorsed shall be left with such clerk, who shall number the same according to the order in each year in which the summons thereon shall be sealed, and shall file the same in his office ; and if any such map or plan as aforesaid shall be annexed to such plaint, the same shall together with such plaint be left with such clerk for the inspection of any defendant in such suit who may require the same ; and every such map or plan together with all other documents in the same suit shall by the said clerk be filed and kept together with such plaint in one and the same place and marked with the name and number of the suit.

Summons to be signed and sealed by clerk and plaint to be left with and numbered by him.
Ib. s. 110.

145. Upon every person whom it shall be intended to make a defendant in any such suit there shall be served in the manner and such service shall be proved in the mode directed by any such general rules as aforesaid (unless in cases where service shall be substituted by leave of the court or the judge thereof), by the plaintiff himself or his agent or the bailiff of the court, a copy of such plaint (but not of any such map or plan) with a copy indorsed thereon of the summons indorsed on such plaint, every such last-mentioned copy to be signed and sealed as an original in like manner as the original summons is hereinbefore directed to be signed and sealed ; and no person shall, unless it shall be otherwise ordered by the court, be deemed a defendant in such suit unless and until he shall be so served.

A copy of the plaint and summons to be served on the defendant.
Ib. s. 111.

146. No misnomer or inaccurate description of any person or place in any such plaint or summons shall vitiate the same, so that the person or place be therein described so as to be commonly known.

Misnomer &c. in plaint or summons not to vitiate.
Ib. s. 112.

"Mining Statute
1865," s. 113.

Defendant may
pay into court
the amount
claimed.

147. It shall be lawful for the defendant, in any suit for or which shall include a pecuniary demand, within such time as shall be directed by any such general rules as aforesaid, to pay into court the amount of the sum claimed in such suit as mentioned in the summons indorsed on the plaint therein together with the costs incurred by the plaintiff in respect of that sum up to the time of such payment and of delivering the notice hereinafter mentioned. Notice of such payment shall be communicated by the clerk of the court or by the defendant and certified by the clerk to the plaintiff by causing the same to be delivered at his usual last-known place of abode or business; and the said sum of money and costs shall be paid to the plaintiff; and after such payment into court no other suit shall be brought or prosecuted in any court in respect of the demand in satisfaction of which such sum shall have been so paid.

Payment into
court of less
than the
demand.

Ib. s. 114.

148. Any defendant in any suit for or which shall include a pecuniary demand may, within such time as shall be directed by the general rules aforesaid, pay into court such sum of money as he shall think a full satisfaction for such demand together with the costs incurred by the plaintiff in respect of that sum up to the time of such payment and of delivering the notice next hereinafter mentioned. Notice of such payment shall be communicated by the clerk of the court to the plaintiff by causing the same to be delivered at his usual or last-known place of abode or business; and the said sum of money and costs shall be paid to the plaintiff; and if he shall elect to proceed and shall recover no further sum in the suit in respect of such pecuniary demand than shall have been so paid into court, the plaintiff shall (unless the court or judge thereof shall otherwise order) pay to such defendant the costs incurred by him in the said suit after such payment into court, and the court may decree the same accordingly.

Objections for
want of parties
in suit with
written
pleadings.

Ib. s. 115.

149. If any defendant to any suit to be prosecuted with written pleadings shall consider that the same is defective by reason of the absence of some party necessary thereto either as plaintiff or defendant, he may within six days after he shall have been served with the plaint therein serve a notice in writing entitled in the suit and bearing the number thereof upon the plaintiff, requiring him to show cause on the day but two next

after such service before the court in which such suit shall be pending or the judge thereof or on such other day as such court or judge shall appoint why the person whose absence is complained of should not be made a party to such suit; and such court or judge shall have power to direct such person to be made a party to such suit by amendment, and shall make such order respecting the same and as to the time within which any amendment which may be ordered is to be made and any amended plaint served if such service shall be ordered and within which a notice of objection as hereinafter mentioned or the answer to the plaint in such suit or both is or are to be served or delivered without reference if the judge shall so think fit to the regular time for such service or delivery and as to the costs of such application and otherwise as such court or judge shall see fit.

"Mining Statute 1895."

150. Within such number of days after a defendant in a suit to be prosecuted with written pleadings shall have been served with the plaint therein as shall be directed by any such general rules as aforesaid, save where it shall be otherwise ordered by the court or the judge thereof, he shall be entitled, if he considers that he has grounds therefor, to serve a notice in writing dated of the day of such service entitled in the suit and bearing the number thereof upon the plaintiff, thereby objecting that the plaintiff by his own showing is not entitled to the relief sought for by his plaint or to some particular part thereof; and every such notice shall set forth the grounds of objection and shall be in the form in the Twelfth Schedule of this Act.

Notice of objections to plaint may be served.

Ib. s. 116.

Twelfth Schedule.

151. Within the same number of days, save where it shall be otherwise ordered by the court or the judge thereof, such defendant may, and whether he shall have served notice of any such objection or not, deliver to the plaintiff an answer in writing to the said plaint dated of the day of such delivery entitled in the suit and bearing the number thereof; and when any such answer shall be delivered, the defendant shall thereby in separate paragraphs numbered consecutively fully answer the statements in such plaint denying admitting or qualifying them, but with the right to decline answering any particular statement on some ground applicable to that statement alone and not to the entire plaint; and by such answer the defendant shall also set forth the matters of fact or grounds upon which he intends to rest his

Answer to be delivered.

Ib. s. 117.

"Mining Statute
1865."

Several
defences.
Cross relief.

Thirteenth
schedule.

Endorsement on
notice of object-
ion and answer.

Ib. s. 118.

As many
defendants as
conveniently can
to combine in
answering.

Ib. s. 119.

Notice to admit.

"The Statute of
Evidence 1864,"
s. 12.

15 & 16 Vict.

c. 65 s. 117.

R. Pr. 29, 30.

Fourteenth

schedule.

Fifteenth

Schedule.

Proof of admis-
sion and notice
to produce.

Ib. s. 13.

15 & 16 Vict.

c. 76 ss. 117, 118.

Ib. s. 119.

defence ; and he may thereby insist upon several distinct defences, and may also thereby make a case for and claim any cross relief which in connection with the matters stated by the plaint he could have obtained by a proceeding instituted by himself ; and every such answer shall be in the form in or as directed by the Thirteenth Schedule to this Act.

152. Every such notice of objection and answer shall have endorsed thereon a statement of the place of abode or business of the defendant or of each of the defendants whose notice or answer it shall be, and the name and place of business of his or their attorney if he or they shall act by such.

153. As many of the defendants in any suit to be prosecuted with written pleadings as can conveniently and without prejudice to their or any of their interests combine in an answer shall do so ; and in estimating the costs of a suit the judge shall consider how far the number of answers which may have been delivered therein was reasonably necessary for the due defence of the defendants or any of them ; and he shall not allow the costs of any answer beyond such as he shall deem to have been so necessary.

154. Either party to any suit or action depending in any Court of Mines may call on the other party by notice to admit any fact or document saving all just exceptions ; and every such notice and admission respectively may be in the form contained in the Fourteenth and Fifteenth Schedules to this Act or to the like effect ; and in case of refusal or neglect to admit, the costs of proving the fact or document shall be paid by the party so neglecting or refusing, whatever the result of the case may be, unless at the hearing trial or inquiry the judge shall certify that the refusal to admit was reasonable ; and no costs of proving any document shall be allowed unless such notice be given, except in cases where the omission to give the notice is in the opinion of the judge of the Court of Mines a saving of expense.

155. An affidavit of the attorney solicitor or agent in the cause or his clerk of the due signature of any admissions made in pursuance of such notice and annexed to the affidavit shall be in all cases sufficient evidence of such admissions ; and an affidavit of the attorney solicitor or agent in the cause or his clerk of the

service of any notice to produce in respect of which notice to admit shall have been given and of the time when it was served with a copy of such notice to produce annexed to such affidavit shall be sufficient evidence of the service of the original of such notice and of the time when it was served.

156. If any party to any suit shall complain that by reason of any uncertainty obscurity or repugnance in the plaint or in any answer in such suit he is unable to make answer to such plaint or to understand any issue tendered or intended to be tendered by such answer, or that any plaint or answer is so framed as to prejudice embarrass or delay the fair hearing of the suit, he may within four days after the service upon him of such plaint or the delivery to him of such answer serve a notice in writing entitled in the suit and bearing the number thereof upon the opposite party, requiring him to show cause on the day but two next after the service of such notice before the court in which such suit shall be pending or the judge thereof or on such other day as such court or judge shall appoint why the plaint or answer should not be amended in respect of the matter complained of; and such court or judge shall have power to direct any such amendment to be made, and shall make such order respecting the same and as to the time within which any amendment which may be ordered is to be made and any amended plaint served if service thereof shall be ordered and within which a notice of objection or the answer or any amended answer to the plaint in such suit or both such notice and answer is or are to be served or delivered without reference if the judge shall think fit to the regular time for such service or delivery and as to the costs of such application and otherwise as such court or judge shall see fit; and no party shall be permitted to appeal from any such order.

157. Upon the expiration of the time limited either as aforesaid or by any special order of the court or the judge thereof for the delivery of the answer of any of the defendants in the case of a suit to be prosecuted with written pleadings, the suit shall be deemed to be at issue between the plaintiff and such defendant; and after the suit shall be at issue as to all the defendants, the plaintiff shall, in the manner to be directed by such general rules as aforesaid, enter the same to be heard on the first day of that sitting of the court which shall occur next after the expiration of

"The Statute of Evidence 1864."

Objection for uncertainty &c.
"Mining Statute 1865," s. 120.

When suit with written pleadings to be at issue.
Ib. s. 121.

When at issue as to all the defendants, to be entered for hearing.

"*Mining Statute* twenty-one days from the time when the suit shall be at issue as 1865." last mentioned.

Notice of hearing to be served.
Ib. s. 122.

158. After any such last-mentioned suit shall have been so entered the plaintiff shall, not less than ten days before the day for which it shall be entered for hearing, serve in the manner and such service shall be proved in the mode directed by any such general rules as aforesaid (unless in cases where service shall be substituted or any shorter time limited by leave of the court) a notice upon the defendant or each of the defendants if more than one, informing him of the day and place upon and at which such hearing is to be had.

Engrossment of plaint notices of objection and answers to be lodged with clerk by the plaintiff.
Ib. s. 123.

159. Within seven days immediately preceding the day for which the hearing shall be so entered, the plaintiff shall make and lodge with the clerk of the court an engrossment on paper book-wise of the plaint and of each notice of objection and answer which shall have been delivered (if any) with any amendments made in any of them and entitled in and bearing the number of the suit; and any defendant who before the commencement of the said period of seven days shall pay to the plaintiff his demand and costs, or submit by a notice to be served on the plaintiff to a decree for all that shall be required by the plaint with costs, shall not be bound to pay the costs of such engrossment.

Mode of proceeding at the hearing where both parties appear in suits without written pleadings
Ib. s. 124.

160. In the case of a suit to be prosecuted without written pleadings, the plaintiff shall at the time and place named in that behalf in any such summons as aforesaid appear; the defendants shall thereupon be required to appear to answer such suit; and on answer being made in court by the defendants or by such of them as shall in the opinion of the court sufficiently represent the defendants, such court shall proceed to hear the suit in a summary way; and upon the hearing of any such suit any defendant may obtain any cross relief which in connexion with the matters stated by the plaint he could have obtained by a proceeding instituted by himself.

Cross relief.

Mode of proceeding at the hearing where both parties appear in suits with written pleadings.
Ib. s. 125.

161. In the case of a suit to be prosecuted with written pleadings the clerk of the court shall on the day for which the hearing of the suit shall be so entered as aforesaid have in court the said engrossment and all other documents in the said suit; and if the plaintiff and the defendants or such of them as shall in the opinion

of the court sufficiently represent the defendants shall appear, the court shall, if no notice of any objection to the relief sought in the suit shall have been served, proceed to hear such suit; but if any such notice shall have been served, then the court shall (unless it shall otherwise think proper) proceed first to hear the objections taken by each notice so served and make its decree against any defendant whose objections shall be overruled and who shall not have delivered an answer, and then proceed to hear the suit as against the other defendants, except any as against whom the court shall be of opinion that by reason of the allowance of any objections the suit should not proceed; but if any such objection shall be allowed and notwithstanding such allowance the court shall be of opinion that the plaintiff would be entitled to some relief legal or equitable whether asked for by the plaintiff or not on proof of the case made by the plaintiff if amended in some manner not causing such case when so amended to differ substantially from the same as originally put forward, the court shall on the application of the plaintiff, if it shall deem that no injustice would be thereby done to any of the parties, order such amendment to be made forthwith, and the defendant whose objection shall have been so allowed forthwith to answer *ore tenus* the plaintiff so amended; and forthwith proceed to hear the suit, save as to any defendant against whom a decree shall have been made as aforesaid; but if it shall deem that such injustice would be done, the court shall adjourn the hearing to such time and to such place within its district as it shall think fit and upon the terms hereinafter in cases of adjournment provided; but if the court shall be of opinion that by no such amendment would the plaintiff be entitled to any relief as against the defendant whose objections shall have been so allowed, then it shall dismiss the suit as against such defendant and any other defendant as against whom it ought in that case in the opinion of the court to be dismissed, and shall make such order as to costs as shall be right. Provided that it shall not be competent to any defendant who shall neither have delivered an answer nor have served any notice of objections to make a case for himself on any such hearing; but such defendant shall only be permitted to controvert the case of the plaintiff; and the plaintiff in any such case shall, on proving his case if in the opinion of the court good in point of law, be entitled to a decree as against such defendant.

<sup>“Mining Statute
1865.”</sup>

"Mining Statute
1865," s. 126.

Objections may
be taken *ore
tenus*.

162. Any defendant whether or not notice of any such objection shall have been served by him, shall be at liberty to take at the hearing *ore tenus* any or any other objection which might be taken by any such notice; and the court shall proceed to hear and to deal with and in respect of such objection as if notice thereof had been served. Provided however that any such objection *ore tenus* shall be taken before the hearing of the suit shall be entered upon. Provided also that in no case shall the court, whether any such objection shall be taken by notice or *ore tenus* or not, make a decree for a plaintiff on a plaint which or which if amended as aforesaid shall show no right to such decree; and in all cases of objections the court shall have power to deal with the costs thereof and of the argument thereof as it shall think just.

Answer may be
amended.

Ib. s. 127.

163. If it shall appear at the hearing that the case designed to be made by any answer is by reason of the omission or the erroneous uncertain or incongruous statement of some fact ineffectual and the court shall have no ground to believe that such error could not be rectified consistently with truth, such court may, if it shall deem that no injustice would be thereby done to the parties and shall see no other objection thereto, order such error to be forthwith rectified and the hearing forthwith to proceed; or if it shall deem that such injustice would be done or shall see any such other objection, may adjourn the hearing to such time and to such place within its district as it shall think fit and upon the terms hereinafter in cases of adjournment provided for.

How objections
or omissions to
answer to be
dealt with.

Ib. s. 128.

164. Whenever a defendant shall have objected to answer any particular statement in a plaint on some ground applicable to that statement alone, the question as to the validity of such objection shall be decided by the court on the examination of the defendant as a witness in reference to the matter of such statement; and when a defendant shall have altogether omitted to answer a statement in a plaint without alleging any reason for such omission or shall have answered the same evasively, he shall be taken to have admitted the same, unless the court shall consider that such course would be unjust; in which event the court may, if it shall think fit, deal with the case as within the next preceding section hereof.

165. If on the hearing of a suit prosecuted with written pleadings it shall appear that any defendant is entitled to any cross relief, the court may grant the same if a case therefor shall have been made by the answer of such defendant ; but if such case shall not have been made, the court may, if it shall deem that no injustice would be thereby done to the plaintiff, order the answer to be forthwith amended in such manner as to make such case, and may grant such relief ; but if it shall deem that any injustice would be done, it may adjourn the hearing to such time and place within its district as it shall think fit and upon the terms hereinafter in cases of adjournment provided for.

"Mining Statute 1865," s. 129.
Defendant may obtain cross relief.

166. Misjoinder of plaintiffs or of defendants shall not be allowed to form a ground of objection in any such notice of objections as aforesaid, and no suit shall be dismissed on the ground of any such misjoinder ; but if the court at the hearing or rehearing of the suit shall deem that no injustice would be thereby done to any of the parties, it shall in the case of misjoinder of a plaintiff forthwith order all such amendments as shall be necessary to rectify such misjoinder to be made in the plaint either by striking out the name of any of the plaintiffs or (if justice shall so require) by changing any plaintiff into a defendant and by adding to the plaint such averments as shall thereupon become necessary ; and in the case of misjoinder of a defendant it shall dismiss the suit as against such defendant, or (if justice shall so require) shall order such defendant to be made a plaintiff and all averments becoming necessary thereupon to be added to the plaint by amendment thereof ; and forthwith in either case proceed to hear the suit ; but if the court shall deem that such injustice would be done, it shall adjourn the hearing to such time and to such place within its district as it shall think fit and upon the terms hereinafter in cases of adjournment provided for.

No suit to be dismissed for misjoinder.
Ib. s. 130.

167. If at or in the course of the hearing or rehearing of any suit it shall appear that any person interested in the subject-matter of the suit and who ought to be a party thereto either as plaintiff or defendant is not such party or in the case of a defendant has not been duly served with the summons or notice of the hearing or does not appear (his absence not being sufficiently excused) the court may either proceed to the hearing

Hearing may be proceeded with in the absence of a party.
Ib. s. 131.

"Mining Statute of the suit in the absence of such person and make a decree
1865."

either binding or saving the rights of such person or adjourn the hearing in order that such person may if a defendant be served with the summons or notice of hearing or if not a party, made such party either as plaintiff or defendant as the case may be, and if made a defendant served with such summons or notice on such terms (if any) as to payment of costs by the plaintiff to any defendant who shall have appeared as such court shall think fit, or may dismiss the suit without prejudice to the right of the plaintiff to commence a fresh suit for the same cause. Provided that whenever the court shall make a decree in the absence of any such person binding the rights of such person, it shall be lawful for the judge in his discretion at the same or any subsequent court to set aside such decree or any part thereof and to grant a rehearing of the suit upon such terms (if any) as to payment of costs giving security or otherwise as such court may think fit on sufficient cause shown for that purpose.

Suits not to be dismissed for variance.

Ib. s. 132.

168. No suit in any court shall be dismissed without the consent of the plaintiff by reason only that the plaintiff shall appear at the hearing to be entitled to different relief from that which shall be sought by any plaintiff; but in every such case and whenever it shall appear at the hearing that the plaintiff is entitled to other relief than that sought by the plaintiff, such court shall cause the plaintiff to be amended and the hearing forthwith to proceed; but in case it shall appear to such court that the defendants or some of them were in fact deceived by such plaintiff and that injustice would be done by proceeding at once in such suit, it shall be lawful for such court to adjourn such hearing to such time and place within its district as it shall think fit and upon the terms hereinafter in cases of adjournment provided for; and whenever at the hearing of any such suit any variance shall appear between the proof and any statement in the plaintiff or in any answer which may have been delivered in any particular or particulars in the judgment of the court not material to the merits of the case, then, if the opposite party could not have been prejudiced thereby in the conduct of his suit or defence, such court may (if it shall see fit so to do) cause such plaintiff or answer to be forthwith amended and the hearing forthwith to proceed; but if the opposite party may have been prejudiced by such variance,

such court shall have power to adjourn the hearing to such time and place within its district as it shall think fit and upon the terms hereinafter in cases of adjournment provided for; and after any amendment made in respect of any such variance the hearing shall proceed either at the time at which the said variance shall have appeared or to which the hearing shall have adjourned in the same manner in all respects both in respect to the liability of witnesses to be indicted for perjury and otherwise as if no such variance had appeared.

169. In no case shall any mere informality in the pleadings or proceedings, or any omission not prejudicial or embarrassing to any of the parties of any name or date or other such matter in the title of the pleadings or otherwise, prejudice any such suit or the defence thereto; but the same if in the pleadings shall be amended forthwith in manner aforesaid.

"Mining Statute 1865,"
In no case informality to prejudice.
Ib. s. 133.

170. Whenever in any of the cases aforesaid or in any case in which the court shall think right so to do the court shall adjourn the hearing of a case, it shall have power to adjourn the same upon such terms as to allowing the plaint or answer or both to be amended, and (where proper) an answer or further answer to be delivered, and as to fixing the time for and manner of delivering such amended plaint or answer or further answer, or as to allowing some subsequent application to be made for liberty so to amend or deliver such answer or further answer, and as to the payment of costs and otherwise as to such court shall seem fit. And whenever any such subsequent application shall be made, the court shall have power to grant the same upon such terms as to costs and otherwise as it shall think just.

Power of court on adjourning a case.
Ib. s. 134.

171. The plaintiff in any suit to be prosecuted with written pleadings shall be at liberty at any time before an answer shall have been delivered to his plaint to amend such plaint as he shall be advised, subject however to the provisions of such general rules as aforesaid; but after any such answer shall have been delivered, no plaintiff shall amend his plaint without the leave of the court or the judge thereof, and no defendant in any such suit shall be at liberty to amend his answer without such leave; and in each of such cases such court or judge shall have power on such terms as to payment of costs or otherwise as it shall think right to grant

Amendments otherwise than at hearing.
Ib. s. 135.

"Mining Statute
1865."

such leave, and that whether or not the suit shall be at issue as to any or all of the defendants ; and the course to be pursued to obtain and after having obtained the same and the times within which any subsequent step in the suit is to be taken shall be that pointed out for the purpose in the said general rules.

Issues and fact
may be tried by
assessors.

Ib. s. 136.

See sec. 229.

172. It shall be lawful for the court, if and whenever it shall think fit so to do, to direct an issue to be tried at such time as it shall appoint before such court and by six assessors to be summoned as hereinafter directed ; and either of the parties to any suit may require that any question of fact material to the issue between the parties shall be tried at the hearing by six assessors to be summoned as hereinafter mentioned ; the verdict of a majority of whom shall in both cases be received ; and whenever any question of fact shall be tried on the requisition of any of the parties the judge in pronouncing his decree in the suit shall act upon the verdict found on such trial ; but whenever an issue shall be tried on the direction of the judge, the judge in pronouncing such decree shall act or not on the verdict found on such trial as he shall think right, and shall have power before pronouncing such decree to direct any other trial or trials of such issue. Provided always that no party to any suit shall be entitled so to require, unless he shall eleven clear days before the day on which the suit is to be heard give notice to the clerk of the court that he requires assessors to be summoned for such hearing and six clear days before such day serve on the opposite party or (if more than one) on such of them as the court shall consider sufficient to represent them or on his or their attorney a notice stating that he has given to the said clerk such notice. Provided also that the party so requiring shall at the time when he shall so require pay into court the sum of six pounds twelve shillings for assessors, any part whereof not required for the payment of assessors shall be returned to the plaintiff, and the residue thereof shall eventually be paid as part of the costs of the suit by such of the parties as the court shall in that behalf direct. [cf. 37 Vic. No. 13 (N.S.W.), sec. 93].

Course to be
pursued in case
of a trial by
assessors.

Ib. s. 137.

173. In any case of a trial by assessors no pleading further than as aforesaid shall be necessary ; but in the case of an issue directed by the judge, he himself shall settle the same ; and in the case of facts to be tried on such requisition of either of the

parties, the parties shall, if they cannot themselves agree thereon, settle under the direction of the judge in the form of an issue the question respecting the fact or each of the facts so to be tried, such settlement to be made at any time before the trial of such question on an application to the judge either in court or in chamber upon notice served by the party requiring such trial upon the other party; and upon the day appointed for such trial the parties shall appear, and the clerk of the court shall then read the issue or question to be tried and the party asserting the affirmative shall unless the court shall have otherwise directed be entitled to begin. Every such trial shall be proceeded on in the same manner as in the case of the trial of an issue directed by the Supreme Court.

174. Whenever the court shall direct that an issue or either of the parties to any such suit shall require that any question of fact shall be tried by assessors, the clerk of the court shall, in the former case on the direction of the court and in the latter case on receiving notice of such requisition, issue to the sheriff within whose bailiwick the place where such issue or question is to be tried shall be, a precept for assessors in the form as near as may be of a jury precept as directed by any Act now or hereafter to be in force relating to juries, thereby requiring the return of special jurors as assessors. [cf. 37 Vic. No. 13 (N.S.W.), sec. 95].

Mode of obtaining assessors.
Ib. § 138.

And thereupon the said sheriff and clerk shall do all such things for the procuring of assessors to try such issue or question as by any Act now or hereafter to be in force are or shall be directed to be done by any sheriff or the proper officer of any court in which an issue in a civil action is to be tried for the procuring of jurors to try such issue.

The swearing or taking the solemn affirmation and declaration instead of being sworn of every such assessor and of every other assessor provided for by this section shall be regulated by the provisions of any Act now or hereafter to be in force in respect to the swearing and taking the solemn affirmation and declaration of jurors for the trial of civil actions.

Any person summoned as such assessor who without lawful excuse shall neglect or refuse to attend or to be sworn or serve as

"*Mining Statute* 1865." such assessor shall be fined such sum of money as the judge shall think fit not exceeding Five pounds.

Provided always that no person shall be summoned or compelled to serve as such assessor more than twice in one year ; and every person so attending as an assessor who shall be summoned to try an issue or fact shall be paid by the clerk of the court ten shillings for each day that he shall so attend and one shilling for every mile beyond three miles that he shall travel to attend such court.

In default of such sufficient number by-standers to act.

Provided further that if a sufficient number of the persons summoned to act as assessors in any court to be holden under this Act shall not attend or shall not remain after any of them shall be challenged and set aside, it shall be lawful for the clerk of such court as often as need be either to nominate and appoint any one or more of the bystanders or to summon a sufficient number of persons from the neighbourhood to act as assessor or assessors until the number of assessors required shall be obtained ; and any of the bystanders so nominated or of the persons so summoned and acting as assessor shall be entitled to receive the same sum for such attendance as if he had been originally summoned to attend, and any of the parties shall have the same right of challenge with respect to such bystanders and persons as he would have had with respect to the person originally summoned. [cf. 37 Vic. No. 13 (N.S.W.), sec. 102.]

Where assessors are not summoned by reason of notice not being given to the clerk.
Ib. s. 139.

175. If notice shall be given by either of the parties that he has required assessors to the other of such parties but by reason that no notice thereof has been given to the said clerk no assessors shall have been summoned, the party to whom such notice shall have been given may, if he shall not consent that the suit shall proceed without assessors, require that any of the bystanders or persons from the neighbourhood shall be appointed or summoned by the said clerk to act as assessors ; and in such event the case shall be deemed to be a case within the provision of the latter part of the next preceding section hereof, and the said clerk shall act accordingly ; and if in such case a sufficient number of assessors cannot be obtained, or if the party to whom such notice shall have been given shall not choose to require that assessors should be so appointed or summoned as aforesaid, he shall be entitled to require that the hearing of the suit be adjourned, and

that the said clerk shall summon assessors for such adjourned hearing ; and thereupon the court shall order such adjournment and to such time and place and upon such terms as to payment of costs or otherwise as such court shall direct ; and assessors shall be summoned for such adjourned hearing ; and the provisions herein contained respecting assessors shall be applicable so far as may be to assessors summoned as last aforesaid. [cf. 37 Vic. No. 13 (N.S.W.), sec. 99].

"Mining Statute 1865."

176. It shall be lawful for any Court of Mines in such way as the said court may think fit to obtain the assistance of accountants engineers surveyors or other scientific persons, or to direct any surveys maps or plans to be made the better to enable such court to determine any matter at issue in any suit or appeal, and to refer any question requiring such assistance to any such person or persons, and to act to such extent as it shall think fit upon his or their certificate ; and the expense of obtaining any such assistance or of such surveys maps or plans shall be deemed to be part of the costs of the hearing.

Court may refer certain matters.
Ib. s. 140.

177. If the plaintiff in any suit shall fail to appear at the time and place at which the same is to be heard or to which the hearing thereof shall have been adjourned, such suit shall (unless the court shall otherwise order) be dismissed with costs as to any defendant who shall appear and apply for such dismissal, without prejudice however to any future suit for the same purpose ; and as to any defendant who shall not so appear and apply, the suit shall (unless the court shall otherwise order) be struck out of the list of causes for hearing and shall not be re-entered without the order of the court.

Proceeding when plaintiff does not appear.
Ib. s. 141.

178. If the defendant or, where more than one, the defendants or a number of them not sufficient in the opinion of the court to represent the defendants shall fail to appear at the time and place at which the same is to be heard or to which the hearing thereof shall have been adjourned, and his or their absence shall not be sufficiently excused, but the plaintiff shall so appear, the court in the case may, upon due proof of the service of the summons or notice of hearing according as the suit shall be prosecuted without or with written pleadings upon the defendants or such of them as shall in the opinion of the court sufficiently represent all

Proceeding where the defendant or a sufficient number of defendants do not appear.
Ib. s. 142.

"Mining Statute
1865."

the defendants not appear, proceed to the hearing of the suit in the absence of the defendants or such of them as shall be absent ; and the decree thereupon shall be as valid as if all the defendants had appeared. Provided always that such court may in any such case at the same or any subsequent sittings of the court set aside any decree so given in the absence of any defendant, and may grant a rehearing of the suit upon such terms (if any) as to payment of costs giving security or otherwise as such court may think fit, on sufficient cause shown for that purpose. But if there shall be no such proof of service of the summons or notice of hearing, then the suit shall, unless the court shall think fit to act under the provision aforesaid for proceeding with the hearing in the absence of a party, be struck out of the list of causes for hearing and shall not be re-entered without the order of the court.

Dismissal for
want of
prosecution.
Ib. s. 143.

179. In case the plaintiff in any suit in any such court shall omit to take any step to be taken by him in such suit at the time at which the same ought to be taken, the defendant shall be entitled to apply to such court for an order that such suit be dismissed for want of prosecution ; and in case any application on notice to any such court or to any judge thereof shall not be brought on at the time at which it ought to be brought on the party against whom such application was to have been made shall be entitled to apply to such court for an order that the notice of such application be discharged with costs ; and in each of the said cases such court shall make such order therein and as to the costs thereof and of such suit or notice of application as it shall think just.

Judge may stay
proceedings
grant time or
adjourn.
Ib. s. 144.

180. The judge of any Court of Mines may, in any case where a court of equity might so do, make orders for staying proceedings until security shall be given for costs, and may also make orders for granting time to the plaintiff or defendant to proceed in the prosecution or defence of the suit or of any such appeal to the Court of Mines as is hereinafter provided for ; and any such judge may also from time to time adjourn any sitting of the court, or may from time to time adjourn or change the place for the hearing further hearing or rehearing of any suit or of any such appeal or the trial or new trial as hereinafter permitted of any issue or question of fact in such manner and on such terms (if any) as to payment of costs or otherwise as to such judge may seem fit.

181. As soon after any decree shall have been pronounced as it can conveniently be done, if the person in whose favour the decree is made shall so desire, the clerk of the court shall draw up the same entitled in the suit and bearing the number thereof; provided that any of the parties objecting to the terms thereof as so drawn up may apply to the judge to settle the same; and when the same shall have been drawn up or if settled by the judge when settled, it shall be signed by the judge of the court; and thereupon it shall become effective and enforceable by the process of the court, unless stayed by the court or unless appealed against or unless the court give time for the performance thereof; and such decree in the case of a suit prosecuted without written pleadings the clerk shall file in his office, and the same shall become the record of such decree; and in the case of a suit prosecuted with written pleadings the clerk shall annex the decree to the engrossment to be lodged with him as aforesaid of the proceedings in the suit in which such decree shall have been pronounced; and such engrossment with such decree so annexed shall be filed in his office by such clerk, and shall thereupon become the record of such suit and decree; and a document purporting to be a copy of any such decree or engrossment or of any such engrossment with any such decree so annexed or of any part thereof, and purporting to bear the seal of the court and to be signed and certified as a true copy by the clerk of the court which shall by such document be stated to have pronounced the decree or of the court in which the suit a copy of the engrossment of the proceedings in which or of any part of which engrossment the said document shall purport to be shall by such document be stated to be or to have been pending, shall be admitted in all courts and places whatsoever as *prima facie* evidence that such decree was pronounced, and that an original of every plaint summons answer or notice of objection or other proceeding a copy of which is purported to be set forth in the said document was served or delivered and made use of in such suit as the same ought to have been served delivered or made use of in order to make good the said suit, and of the regularity of such decree and engrossment without any further proof.

182. It shall be lawful for a judge of a Court of Mines within six weeks after his resignation of office, and for a deputy judge within six weeks after the determination of his appointment, to

"Mining Statute
1865," s. 145.
Decree to be
drawn up.

Judge or deputy
judge may
act after
resignation &c.
Act No. 443, s. 11.

Act No. 446. give in to the clerk of the said court a written judgment in any action suit or other proceedings heard before the said court judge or deputy judge, and such clerk shall publicly read such written judgment at the next sitting of such court, and a judgment decree or order shall be entered or drawn up in pursuance of such judgment; and every such judgment decree or order and every judgment decree or order which has been so heretofore entered or drawn up, shall have the same force and effect as if the judgment in pursuance whereof it shall be or has been entered or drawn up had been given by such judge or deputy judge in open court on the day before his resignation or the determination of his appointment, save that all times that run from the giving of judgment shall run from the reading thereof by the clerk. This section shall be deemed to have been in force on and since the first day of March One Thousand eight hundred and seventy-two.

(d) *Enforcement of Decrees and Orders.*

Execution
against
property.

"Mining Statute
1865," s. 146.

183. It shall not be necessary to serve any decree or order made at the hearing or rehearing of any suit or of any such appeal to a Court of Mines as hereinafter provided for; but whenever such court shall decree or order the payment of money and the same shall not be paid into court or otherwise as the court shall have directed either forthwith or within the time limited for that purpose, it shall be lawful for the clerk of the court at the place at which such decree or order shall have been made, upon the request of the person entitled under such decree or order and without any previous notice or summons to the person required to pay the same, to issue out of such court a warrant in the form contained in the First Part of the Sixteenth Schedule to this Act.

First part of the
Sixteenth
Schedule.

The bailiff of the said court shall execute the said warrant in any part of Victoria, and all constables and other peace officers within their several jurisdictions shall aid and assist in the execution of every such warrant; and every bailiff or officer executing any such warrant as last aforesaid may by virtue thereof seize and take any of the lands tenements hereditaments goods and chattels personal of the person against whom such warrant shall have issued (excepting the wearing apparel and bedding of such person or his family and the tools and implements of his trade to

the value of ten pounds which shall to that extent be protected from such seizure) and dispose of the same in due course of law in or towards payment of the sum in respect of which such warrant shall have issued ; and may also seize and take any money or bank notes and any cheques bills of exchange promissory notes bonds specialties or securities for money belonging to any such person against whom any such execution shall have issued as aforesaid.

"Mining Statute
1865."

Such bailiff may and shall pay and deliver to the party suing out such execution any money or bank notes which shall be so seized or a sufficient part thereof and shall hold any cheques bills of exchange promissory notes bonds specialties or other securities for money which shall have been so seized or taken as aforesaid as a security or securities for the amount directed to be levied by such warrant or so much thereof as shall not have been otherwise levied or raised for the benefit of the person entitled as aforesaid who may sue in the name of the party against whom any such warrant shall have issued or in the name of any person in whose name such party might have sued for the recovery of the sum or sums secured or made payable thereby when the time of payment thereof shall have arrived.

Provided that the expression "lands tenements and hereditaments" in this section and in the said Sixteenth Schedule shall comprise and include an equity of redemption, and also all interest to which the person against whom such warrant shall have issued is entitled at law or in equity in any houses lands or other hereditaments corporeal or incorporeal and real estates in Victoria and which he might according to the laws of Victoria have disposed of by virtue of any power or otherwise for his own benefit, and also any land or building or share or interest at law or in equity therein occupied or held by such person by virtue of any miner's right or business licence ; and all powers vested in any such person which such person might legally execute for his own benefit shall be and are hereby by virtue of such warrant vested in the said bailiff to be by him executed for the benefit of the party suing out such warrant.

Sixteenth
Schedule.

Provided always that no lands tenements and hereditaments shall be sold under any such warrant until one month next after notice of time and place of such sale shall have been published in

“Mining Statute 1865.” the *Government Gazette* and in some newspaper circulating in the neighbourhood of such lands tenements and hereditaments.

Certificate of decree &c. may be forwarded to clerk of another Court of Mines. Sixteenth Schedule. Second Part.

Provided also that when any such court shall decree or order the payment of money, the clerk of such court shall, upon the application of the person entitled under such decree or order, deliver to such person a certificate in the form in the Second Part of the Sixteenth Schedule to this Act directed to the clerk of any other Court of Mines, and shall make a minute thereof in the register to be kept by such first-mentioned clerk as hereby provided; and such certificate, if forwarded to the clerk to whom the same shall be directed, shall be filed by him, and thereupon execution shall issue as upon a decree or order of the court to the clerk of which such certificate shall have been directed.

On sale of land or share held under a miner's right &c. bailiff to give certificate. *Ib. s. 147.*

184. Whenever the bailiff of any court shall sell any land or building occupied or held under a miner's right or business licence or any share or interest at law or in equity therein, whether under a warrant issued out of a Court of Mines or by a warden as hereinafter provided for, such bailiff shall give to the purchaser thereof a certificate of sale, specifying such land building share or interest and the name of the person whose land building share or interest shall have been sold; and every such certificate shall forthwith vest in such purchaser all the right title and interest which the person against whom such warrant shall have been issued had at the time of issuing thereof in such land building share or interest.

On disobedience of decree for payment of money debtor may be summoned and examined. *Ib. s. 148.*

185. Whenever any sum of money recoverable for costs damages or otherwise under any decree or order made at the hearing of any suit or of such appeal as aforesaid in any court or under any decision of any warden as hereinafter provided for a certificate of which decision shall have been filed in any court holden under this Part of this Act shall remain unsatisfied either in the whole or in part, it shall be lawful for the person entitled to recover such money, whether any such warrant as aforesaid or as hereinafter provided to be granted by a warden in case of the non-payment of any debt costs or damages awarded by the decision of a warden shall or shall not have been issued for the same, to obtain from the clerk of the said court a summons in the form contained in the Seventeenth Schedule to this Act or to the like effect

Seventeenth Schedule.

directed to the person liable to pay such money ; and such summons may by order of the judge of such court be made returnable before the same or any other Court of Mines or any judge of any Court of Mines, but without such order such summons shall be made returnable at the place at and before the court out of which it shall be issued and such summons shall be served personally. If the person so liable shall appear in pursuance of such summons at such place as shall be therein named, he may be examined upon oath touching his estate and effects and as to the property and means he has of paying satisfying and discharging such sum of money or such part thereof as shall remain unsatisfied and as to the disposal he may have made of any property and as to his intention to leave Victoria without paying such money or part as shall be still unsatisfied or to depart elsewhere within Victoria with intent to evade payment thereof and as to the mode in which the liability the subject of such decree or decision was contracted. The person obtaining such summons as aforesaid and all other witnesses whom the court shall think requisite may be examined upon oath touching the inquiries authorized to be made as aforesaid.

186. If a party so summoned as aforesaid shall not attend as required by such summons and shall not allege a sufficient excuse for not attending, or shall if attending refuse to be sworn or to disclose any of the things aforesaid, or if he shall not make answer touching the same to the satisfaction of the court or judge before whom such summons shall be returnable, or if it shall appear to such court or judge by oral testimony or affidavit or by both that the said party contracted the liability which was the subject of such decree order or decision by any fraud or breach of trust or has made or caused to be made any gift delivery or transfer of any property or charged removed or concealed the same with intent to defraud the person entitled to such money as aforesaid or with intent to defeat any execution issued upon such decree order or decision, or if on such evidence as aforesaid it shall appear to the satisfaction of such court that the party so summoned has then or has had since the time of making such decree order or decision sufficient means and ability to pay the sum so recovered against him and so due and unsatisfied as aforesaid or that he is about to leave Victoria without paying

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1895."

And in case of
non-attendance
he may be
imprisoned.

ib. s. 149.

"Mining Statute 1865." such money as shall then be still unsatisfied or to depart elsewhere within Victoria with intent to evade payment thereof, it shall be lawful for such court or judge (if it or he shall think fit) to order that, unless such party shall pay into the court before which or the judge of which such summons shall have been returnable either forthwith or within the time limited in such order the money so unsatisfied together with the costs of and occasioned by such summons and examination, he shall be committed to prison for any period not exceeding six months.

Examination may be had on the original hearing.

Ib. s. 150.

187. In any case in which any defendant in any suit in any Court of Mines shall personally appear at the hearing of the same, the court at such hearing or at any adjournment thereof, if a decree shall be made against the defendant, shall at the instance of the plaintiff have the same power and authority of examining the plaintiff and defendant and other parties touching the things hereinbefore mentioned and of making an order as such court might have exercised under the provisions hereinbefore contained in case the plaintiff had obtained a summons for that purpose after decree made as hereinbefore mentioned.

Form of commitment.

Ib. s. 151.

188. Whenever any order for commitment shall have been made under the provisions hereinbefore contained and the money and costs named therein shall not have been paid into court in pursuance thereof, the clerk of such court shall, without any previous notice or summons to the party required to pay the same, issue a warrant in the form in the Eighteenth Schedule to this Act or to the like effect; and the bailiff of the said court and the keeper of the gaol to whom such warrant is directed shall respectively execute and obey the said warrant and all constables and other peace officers shall aid and assist in the execution of such warrant.

Imprisonment not to operate as discharge of debt.

Ib. s. 152

189. No imprisonment under any such warrant shall operate as a satisfaction or discharge of the amount due under any decree or order; but it shall be lawful for the clerk of such court from time to time to issue an execution under section one hundred and eighty-three hereof upon such decree or order.

Prisoner to be discharged on payment.

Ib. s. 153.

190. Any person imprisoned under this Act by virtue of any such warrant as aforesaid, who shall have paid or satisfied the sum of money and costs remaining due at the time of the

issuing of such warrant together with all subsequent costs, shall be discharged out of custody upon the certificate of such payment or satisfaction signed by the clerk and sealed with the seal of the court in which such order of commitment shall have been made.

191. It shall be lawful for any party so committed to prison to require the person to whom was due the money in respect of which the summons for the examination of such party shall have been issued, by notice in writing to be served on such person or at his last-known place of abode, to show cause at a time to be expressed in such notice before such court or judge why such party should not be discharged from prison; and such court or judge shall, whether such person shall appear or not on such notice, make such order in the matter and as to the costs thereof as he shall think fit.

192. Whenever any court holden under this Part of this Act or any judge thereof shall make any decree or order other than a decree for the payment of money and any person named therein and intended to be bound thereby shall disobey such decree or order, it shall be lawful for any person entitled to the benefit thereof to obtain a summons in the form in the Nineteenth Schedule to this Act from any clerk of such court, requiring the party so disobeying to appear at such time and place as shall be directed by the said summons before the same or any other Court of Mines or a judge of any such court to show cause why he should not be committed to prison for disobedience of such decree or order, and stating in what respects such decree or order has been disobeyed; and such summons may, by order of the court or the judge who shall have made such decree or order, be made returnable at any place before the same or any other Court of Mines or before a judge of any Court of Mines at such place in Victoria as such court or judge shall appoint, but without such order such summons shall be made returnable at the place at and before the court out of which it shall be issued; and such summons shall be served personally or at such place or upon such person or in such other manner as the judge may under the special circumstances of the case direct.

If the person so summoned shall appear in pursuance of such summons or shall without any sufficient excuse fail so to appear

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Application for
discharge from
prison.

Ib. s. 154.

On disobedience
of other decrees
party may be
summoned and
committed.

Ib. s. 155.

Nineteenth
Schedule.

“*Mining Statute* 1865.” or to appear at any time or place to which the hearing of such summons may be adjourned, it shall be lawful for the court before which or the judge before whom such summons shall be returnable to inquire into the matters mentioned in such summons on affidavit or on the oath of one or more than one credible witness or upon oath and affidavit; and if it shall appear to such court or judge that the person so summoned has in fact disobeyed such decree or order, it shall be lawful for such court or judge to order that such person be committed to prison; and thereupon the clerk of the court at the place at which such last-mentioned order shall have been made or the clerk of the court in which the suit or proceeding in which the decree or order so disobeyed shall have been instituted or be depending shall, without any previous notice or summons to the person so ordered to be committed, issue a warrant in the form in the Twentieth Schedule to this Act or to the like effect; and the bailiff of the said court and the keeper of the gaol to whom such warrant shall be directed shall respectively execute and obey the said warrant, and all constables and other peace officers within their several jurisdictions shall aid and assist in the execution thereof.

Twentieth
Schedule.

Prisoner may be
discharged on
performance.
Ib. s. 156.

193. Whenever any person shall be in custody under such warrant as last aforesaid it shall be lawful for the officer in whose custody such person may be, on receiving an order for that purpose under the hand of the judge of the court by which or by the judge of which such order of commitment shall have been made, from time to time to bring such person before such judge; and it shall be lawful for such judge either verbally to remand such person to his former custody, or, if it shall appear to such judge that such person has either performed the decree or order for disobedience of which such person was committed or has paid to the person obtaining such order of commitment or to the clerk of such court in his behalf full compensation for the breach of such part of the decree or order as can no longer be performed together with all costs subsequent to the pronouncing of such decree or order including the costs of obtaining such commitment or that otherwise under the special circumstances of the case it would be proper so to do, verbally to order the person so in custody to be forthwith discharged on such conditions as to performance of so much of the order as there remains to be and is capable of being

performed as such judge shall direct, and such person shall be discharged accordingly; or it shall be lawful for such judge on being satisfied of the matters aforesaid, instead of causing the person so in custody to be brought before him, by order under his hand directed to such officer to order the immediate discharge of such person who shall be discharged accordingly.

194. Any order of commitment hereinbefore mentioned may (if the special circumstances of the case shall appear to any such court or judge to warrant it) be made by such court or judge *ex parte* and without notice, on proof by affidavit only of any of the matters aforesaid; and in that case such order of commitment under the hand of the judge of the court by which or of the judge by whom such order shall have been made may be filed in any court for which such judge shall have been appointed, and such person may be dealt with as if an order of commitment had been made as hereinbefore directed.

"Mining Statute 1865."

Order may be
ex parte.
Ib. s. 157.

(e) *Interlocutory and Miscellaneous Orders.*

195. It shall be lawful for the judge of any Court of Mines, upon the application of any person claiming to be legally or equitably interested either as a member of a mining partnership or otherwise in any such land water race dam or reservoir as mentioned in section one hundred and thirty-five hereof or in any share or interest therein or in any earth gold or metal or mineral other than gold in or to be taken out of such land, by order under the hand of such judge to enjoin any person named in such order from trespassing or encroaching upon or occupying working or using any such land water race dam or reservoir or any such share or interest, or from mining for winning or removing such earth gold metal or mineral or any part thereof or from selling or disposing of or otherwise interfering with any such land water race dam or reservoir earth gold metal or mineral or any such share or interest or the property of any such partnership or any part thereof, or from doing any other act whereby the right title or interest of such applicant in or to such land water-race dam or reservoir earth gold metal mineral share or property may be affected, until the hearing and determination of any suit the summons in which shall at the time of such application have been

Power to grant
injunction.
Ib. s. 158.

"Mining Statute sealed or of any appeal then pending or until the further order of 1865." such judge or court, with power to impose such terms on the granting of such order as such judge may deem just.

General powers to grant injunctions not to be restricted. *Ib. s. 159.*

196. The next preceding section shall not be deemed to lessen or in any way interfere with the powers to grant an injunction which may be incident to the jurisdiction of the Court of Mines as defined by section one hundred and thirty-five of this Act; but on the contrary the said Court of Mines and every judge thereof shall have the same powers in suits appeals and proceedings under this Part of this Act of granting injunction orders as are vested in the Supreme Court or any judge thereof.

Court to have power to issue injunction to restrain proceedings at law. *Ib. s. 160.*

197. In any suit in the Court of Mines in which the Supreme Court would in like case grant an injunction to restrain proceedings, the judge of the Court of Mines may grant an order to enjoin any person therein named from proceeding in the Supreme Court or in any county court warden's court or court of petty sessions in any plaint complaint or matter mentioned in such order.

Manager may be appointed. *Ib. s. 161.*

198. It shall be lawful for the judge of any court, upon the application of any party to any suit or appeal, by order under the hand of such judge to appoint some one or more fit and proper person or persons to be a manager or managers, under whose direction any such land water race dam or reservoir as is referred to in section one hundred and thirty-five of this Act may be worked or used or any such earth gold or other metal or mineral obtained thereout, and who shall receive all earth gold or other metals or minerals taken therefrom, and by such order to direct all persons interested in employed upon or in any way claiming occupation possession or use of such land water race dam or reservoir or earth gold metals or minerals to deliver up possession of the same and of all machinery and plant upon any such land or used in connexion with working the same to such manager or managers; and every such manager shall be subject to the control of such court in the same manner and to the same extent as receivers appointed by the Supreme Court are subject to the control of that court.

Gold &c. may be ordered to be deposited. *Ib. s. 162.*

199. It shall be lawful for the judge of any Court of Mines, upon the application of any party to any suit or appeal in such

court, by order under the hand of such judge to direct any person party to or interested in such suit or appeal to deposit within the time or times mentioned in such order, with any person or at any place named in such order, in the name of the clerk of such court or in the name of any other person mentioned in such order, to abide the decision of such court, any earth gold or other metals or minerals money or other chattel described in such order which may then be or which at any time before the final determination of such suit or appeal may come into the possession power or control of such person party to or interested in such suit or appeal and the right to which will in the opinion of such judge be put in issue in the course of such suit or appeal ; and the judge may (if he think fit) direct in and by such order that any such gold or money shall be invested at interest in Government securities in such manner as the judge shall think fit.

"Mining Statute
1865."

200. It shall be lawful for the judge of any such court, on the application of any person party to any suit or appeal in such court by order under his hand, to direct any other person party to or interested in the same suit or appeal to produce, and leave with the clerk of such court or at any other place for the inspection of such applicant, any book deed letter account or other document in the possession or power or under the control of such other person and which in the opinion of such judge shall relate to any matter in issue in such suit or appeal and to the inspection of which such judge shall consider the applicant entitled.

Production of
documents may
be ordered.
Ib. s. 163.

201. It shall be lawful for any judge of any such court, in his discretion upon the application of any person who shall have appealed to such court from the decision of a warden to be made under the provisions hereinafter contained and upon such terms as such judge shall think just, by order under his hand, and although a similar order may have been refused by the warden, to direct that all further proceedings shall be stayed under such decision until the hearing of such appeal or the further order of such judge or of such court ; and such proceedings shall be stayed accordingly.

Power to stay
proceedings on
appeal.
Ib. s. 164.

202. Every order authorized to be made under any of the seven next preceding sections may at the discretion of the judge be

Orders may be
had *ex parte* and
varied.
Ib. s. 165.

"Mining Statute 1865." made either *ex parte* or upon notice to the parties to be affected thereby or their attorney, and may also upon such notice be discharged or varied on the application of any person affected thereby. Provided always that every *ex parte* order shall be made on affidavit only ; but any order made upon notice as aforesaid may be made either on affidavit or oral testimony or both.

Court to have power to make order requiring warden surveyor or other officer to perform duties of his office.

Ib. s. 166.

203. If any warden surveyor registrar or any other officer appointed under or in pursuance of this Part of this Act shall refuse or neglect to perform any duty which in his capacity as such officer ought to be performed by him, it shall be lawful for the judge of the Court of Mines, upon the application of any person interested in the due performance of such duty founded upon affidavit setting out the facts upon which the application shall be grounded, to make an order calling upon such warden surveyor registrar or other officer to show cause at a place within the district of such court or by consent at any other place and time to be named therein why he should not perform the duty so stated to be neglected or refused to be performed ; and if the officer named in such order shall fail to show to the satisfaction of the judge that he has duly performed such duty or that he had sufficient grounds for refusing to perform the same, the judge shall (if he see fit) make an order enjoining such warden surveyor registrar or other officer to perform such duty within a time to be named in such order ; and in any case in which it shall have been at the instance of any third person claiming a right in the matter that such officer shall have refused to perform any act or duty, such judge shall (if he shall think fit) before he make any final order in the matter cause to be summoned such third person to show cause why such order should not be made, and (if necessary) direct any action or suit to be instituted or any issue of fact without an action or suit to be tried to determine the rights of such third person ; and the judge shall in every case make such order as to such action suit or issue and as to the costs thereof and of such application as in the particular circumstances of each case he shall see fit. Provided that in every case in which the judge shall upon sufficient cause being shown by the officer against whom any such order to show cause shall have been made discharge the same, the person upon whose application the same shall have been obtained shall (unless the judge shall otherwise order)

pay to such officer the costs which such officer shall have incurred in showing cause against such order, such costs to be taxed by the judge as between attorney and client.

204. Every order made by any judge under any of the provisions contained in any of the sections from the one hundred and ninety-fourth to the two hundred and second hereof inclusive may be made at any place in Victoria where such judge shall happen to be at the time of the application to him therefor, or at any other place in Victoria to which he shall adjourn the hearing of the said application and may be in the form contained in the Twenty-first Schedule to this Act without any further recital than is directed by such form ; and every such order shall (except the judge shall otherwise order) be served by delivering a copy to the person to be bound thereby and at the same time showing the original order if such person shall require to see the same ; and every such order may be filed with the clerk of any court within the district for which such judge shall be appointed or of the court in which any suit or proceeding in which such order may have been made shall have been instituted or be depending, and shall be enforced and proceeded on in all respects like any decree of such court. If the judge shall see fit so to order, it shall be sufficient service of any injunction order or of any order appointing a manager or receiver to lodge a copy of such order in the office of the warden of the district in which the land referred to in such order shall be situated, and to publish a copy of such order in some newspaper circulating within such district, and to affix a copy of such order in some conspicuous place upon the land referred to thereby.

205. On the application of any person to a judge of a Court of Mines stating that any owner of such land water race dam or reservoir as mentioned in section one hundred and thirty-five hereof or of any share or interest therein is a lunatic and incapable of managing the same, such judge shall, in case he shall be satisfied that no committee has been appointed for such owner as a lunatic, inquire into the matter upon such evidence and by such means as he shall think proper, and shall direct such notice of the application as he shall think right to be given to such of the relations or friends of the alleged lunatic as he shall think just ; and if he shall be of opinion that such statement is true, he

"Mining Statute 1865."

Form of order and mode of enforcing it.
Ib. s. 167.

Twenty-first Schedule.

Power to appoint provisional guardian of lunatic.
Ib. s. 168.

“Mining Statute 1865.” shall by order under his hand appoint a guardian of such lunatic with such remuneration for the performance of his duties, to be payable out of the profits of such land water race dam or reservoir share or interest, as such judge shall think just.

Such guardian shall before entering upon the duties of his office give such security for the due performance of such acts and duties, and for the fulfilment of such conditions as such lunatic should perform and fulfil for the preservation of his interests as such owner having regard to the nature of the property of which he shall so be the owner, and for accounting for the income thereof, as such judge shall think proper ; and every such guardian shall as to such property have the same powers and perform the same duties as are now or shall be prescribed by law in the case of committees of lunatics in respect of their estates, but only until any such committee shall be regularly appointed or until such guardian’s removal from his office by an order of the said judge ; and the judge who shall have appointed such guardian shall in respect of such property have and exercise the same jurisdiction over such guardian as the Supreme Court is or shall be empowered to exercise in respect of the estates of lunatics over committees of their estates appointed according to law ; and every such lunatic shall sue and defend in any court holden under this Part of this Act or before any warden by such guardian.

Provided that for the purpose of this section the word “lunatic” shall mean any person who shall in the opinion of such judge after such inquiry as aforesaid be lunatic or of unsound mind ; and every such order shall be filed with the clerk of the court whose office shall be nearest to such property ; and a copy of such order sealed with the seal of such court and signed and certified by such clerk as a true copy shall be receivable as *prima facie* evidence in all courts of the matters therein stated, and of the due appointment as such guardian of the person therein stated to be so appointed.

Minutes of proceedings to be kept and to be evidence.

Ib. s. 169.

206. The clerk of every Court of Mines shall cause a minute of all complaints decrees and orders of the court and executions and returns thereto and of all other proceedings of the said court or of the judge thereof to be entered in a register to be kept by him for the purpose, such register to be in the form prescribed by such

general regulations as aforesaid ; and a document purporting to be a copy of any such entry in the said register, and to bear the seal of such court, and to be signed and certified as a true copy by the clerk who shall have the custody thereof, shall at all times be admitted in all courts and places whatsoever as evidence of such entry and of the proceedings referred to thereby, and of the regularity of such proceedings without any further proof.

“Mining Statute 1865.”

(f) Rehearings Special Cases and Appeals.

207. It shall be lawful for any Court of Mines or the judge thereof, upon such terms (if any) as to payment of costs or otherwise as such court or judge shall think fit, to grant as often as such court or judge shall deem proper a rehearing of any suit in or appeal to such court or a new trial before assessors of any issue or question of fact therein ; and for that purpose (if necessary) to set aside any decree or order made in such suit or appeal or on any rehearing thereof or any verdict given on the trial or any new trial of any such issue or question of fact. Provided that, within seven days after such decree or order shall have been made or the verdict on any such trial or new trial shall have been given, the party applying for such rehearing or new trial shall serve upon the opposite party a notice that the application therefor will be made at the expiration of two days from the day of the service of such notice or on the first day thereafter on which the same can be heard ; and upon the hearing of such application the court or judge shall fix the time for such rehearing or new trial if the same shall be granted and direct such notice thereof to be given and in such manner as it or he shall think right to any of the parties ; and in the case of a rehearing it shall be lawful for the court or judge to direct or for either of the parties to require that any particular question of fact material to the issue between the parties shall be tried before such court and six assessors. Provided that in case of either of the parties so requiring such party shall require the same at the time at which the rehearing shall be granted, and shall also then give notice to the clerk of the court that he so requires and lodge with such clerk the sum of six pounds twelve shillings for the assessors ; and the provisions hereinbefore contained as to trials of issues and questions of fact by assessors shall be applicable to new trials of issues and ques-

Court or judge may grant rehearings and new trials of issue.
Ib. s. 170.

"Mining Statute
1865."

tions of fact and to the case of assessors directed or required on the granting of rehearings.

Appeal from
order granting
rehearing.
Act No. 446, s. 26.

208. Any party to any suit in any Court of Mines who shall be dissatisfied with the granting of an application for the rehearing of such suit may appeal from the order granting the same to the Full Court within seven days after such application shall have been granted, and the said Full Court shall have the like jurisdiction with respect to such appeal as if the same were expressly given by this Act.

Judge may state
special case for
opinion of
Supreme Court.
"Mining Statute
1865," s. 171.

209. On the hearing or rehearing of any such suit or appeal or upon the trial or new trial of any issue in any Court of Mines it shall be lawful for the judge of such court (if he shall think fit) to reserve any question in the form of a special case for the opinion of the Supreme Court which opinion such Supreme Court is to give; and in such case no decree or order shall be made in respect of any matter on which such question shall have been reserved until such opinion shall have been given; and every such special case shall after it shall have been prepared by such judge be transmitted by the clerk of the court to the Prothonotary of the Supreme Court who shall cause the same to be set down for argument before the said Supreme Court. [cf. 62 Vic. No. 38 (N.Z.), sec. 292].

Appeal from
Court of Mines.
Ib. s. 172.

210. Any party to any suit in any Court of Mines or to any proceeding before the judge of any such court (except where the contrary is herein provided) who shall be dissatisfied with any decree or order of the said court or with any order of a judge thereof not being an order of commitment made by such court or judge may appeal from the same to the Full Court. Provided he shall, within ten days after such decree or order or in case an application shall have been made for the rehearing of any suit then within seven days after such application shall have been refused or if granted after the decision upon such rehearing or the abandonment by notice to the opposite party or the discharge for want of prosecution of the order therefor, give notice in writing of such appeal to the opposite party or his attorney, and also give security (to be approved by the clerk of the said Court of Mines) for the costs of the appeal, or in lieu of giving such security deposit in the hands of such clerk the sum of Twenty-five pounds to answer the costs of the appeal if such appeal

should be dismissed ; and every such notice of appeal shall set forth the grounds thereof ; and every such appeal shall be decided by the said Full Court on the facts as agreed on between the parties or their attorneys or counsel or stated by the judge from the order of whom or by the judge of the court from the decree or order of which such appeal shall be brought ; and such facts shall be set forth in the form of a case agreed on by both parties or their attorneys or counsel ; and if they cannot agree, the judge shall settle such case and sign it ; and the appellant shall within four weeks from the day of the service of such notice or within such other time as such judge shall from time to time direct transmit such case and a copy of the said notice of appeal to the said Prothonotary, who shall cause the same to be set down to be argued before the said Full Court. [cf. 62 Vic. No. 24 (Q.), sec. 150 ; 62 Vic. No. 38 (N.Z.), sec. 291 ; 37 Vic. No. 13 (N.S.W.), sec. 115.]

211. The said Full Court shall decide the matter of such appeal and make such order therein as shall appear just, and may either dismiss such appeal or reverse or vary such decree or discharge or vary such order, and may direct the cause to be reheard before the Supreme Court, but shall not in any case remit the cause for rehearing before the judge of the court from which such appeal shall have been brought, and may make such order with respect to the costs of the said appeal and of the suit or proceeding in which such decree or order shall have been made as it may think proper ; and every such order of the Full Court shall be final, and shall be deemed to be and shall be a final order of the Supreme Court of Victoria for the purposes and within the meaning of any Orders of Her Majesty in Council now or hereafter to be in force in relation to appeals from the Supreme Court of Victoria.

Full Court to decide the appeal.
Ib. s. 173.

212. No appeal from any decree or order of any such Court of Mines or judge thereof to the said Full Court shall lapse or from the coming into operation hereof shall be deemed to have lapsed in consequence of the death removal or resignation of such judge after such decree or order shall have been made, but notwithstanding such death removal or resignation may be proceeded with heard and determined by the said Full Court ; and the successor of such judge so dying or being removed or resigning shall have the like powers of settling and signing the case on

Appeal not to lapse by death removal or resignation of judge of Court of Mines.
Act No. 446, s. 10.

Act No. 446. such appeal as such judge could have exercised had he lived or continued in office.

Opinion of Supreme Court or decision of the Full Court to be transmitted to Court of Mines.

"Mining Statute 1865," s.174.

See secs. 265, 261, 267, 268.

213. As soon as the opinion of the Supreme Court shall have been given upon any special case or the decision of the Full Court pronounced upon any appeal, the said Prothonotary shall cause the same to be drawn up and shall transmit the same to the clerk of the court from the decree or order of which or from the order of the judge of which such appeal shall have been brought; and in the case of a special case, the judge who shall have reserved the same shall make his decree or order in accordance with the opinion given thereon; and in the case of an appeal, if the same shall have been dismissed, the decree or order appealed from shall be proceeded on as if there had been no appeal; but if such decree or order shall have been reversed or varied, the clerk of the court by which or by the judge of which such decree or order shall have been made shall enter in the register to be kept by him as aforesaid a minute of such reversal or variation with the nature of the variation, and in the case of a decree shall amend in accordance therewith the decree so as aforesaid to be filed in his office or to be annexed to such engrossment as aforesaid; and the decree or order as reversed or varied shall be deemed to be the decree or order of such last-mentioned court or judge, and shall be proceeded on accordingly.

In case of a special case or appeal an injunction &c. and stay of proceedings may be had.

Ib. s. 175.

214. Whenever any such special case shall have been reserved or any such appeal brought or be about to be brought, it shall be lawful for the court the judge of which shall have reserved such case or from the decree or order of which or from the order of the judge whereof the appeal shall have been brought or for such judge, on the application of any of the parties interested in such case or appeal, to make such order for an injunction or receiver or payment of money into court or in the case of an appeal for stay of proceedings or otherwise and upon such terms as such court or judge shall think proper; but without such order no appeal shall operate as a stay of proceedings.

(2) *Wardens.*

(a) *General Provisions.*

Wardens may be appointed.

Ib. s. 176.

215. It shall be lawful for the Governor in Council subject to the provisions of the *Public Service Act* 1890 from time to time to

appoint in and for Victoria or any district or portion thereof certain judicial officers, who shall be called "Wardens of the Gold Fields" and who shall within the limits for which they shall have been so appointed have and exercise the jurisdiction hereinafter mentioned; and all such wardens shall be appointed in the same manner as justices. Provided always that the several persons who at the time of the commencement of this Act shall hold the office of warden shall be the first wardens under this Act, and shall so act without any fresh appointment or commission. [cf. 37 Vic. No. 13 (N.S.W.), secs. 12, 67; 62 Vic. No. 24 (Q.), sec. 105; 57 Vic. No. 24 (Tas.), secs. 8, 13; 59 Vic. No. 40 (W.A.), secs. 10, 49; 62 Vic. No. 38 (N.Z.), sec. 11.]

216. Every warden shall have jurisdiction to hear and determine all suits cognizable by a court of law which the Courts of Mines are by section one hundred and thirty-five of this Act empowered to hear and determine, and also the further jurisdiction following (that is to say):—To hear and determine all suits concerning any Crown land or share or interest therein which the complainant shall claim to be entitled to take possession of and occupy for residence or business under a business licence and of which the defendant is and claims to be entitled to be in possession, and concerning any trespass upon any such land of which the complainant is in the occupation or possession and claims to be entitled to possess under such licence, and concerning any money claimed to be due to the complainant upon any mining partnership account or as in any way accruing to the complainant from any mining partnership adventure or interest; and also to hear and determine all suits which may be brought for the recovery of the amount of any contribution as ascertained according to the provisions of any by-law of a mining board towards the expenses of any appliances for raising or lifting water or of the working thereof, and also all suits which may be brought for the recovery of any sum of money which any person shall be liable to pay under the provisions of this Part of this Act or of any such by-law and for which no other mode of recovery is hereby provided; and such jurisdiction shall extend not only to cases where the litigants shall be the parties originally interested in the causes of suit, but also to cases where the title of any of such litigants shall be derived as assignee or otherwise from or through any of such

Jurisdiction of
Warden.
Ib. s. 177.

"Mining Statute
1865."

Limited in debt
or contract to
one hundred
pounds and
decision to be
final.

parties. Provided always that where any sum of money shall be claimed to be due in respect of a debt or of a contract or upon partnership account or as accruing to the complainant from any mining partnership adventure or interest, such jurisdiction shall not extend to cases where such sum shall exceed One hundred pounds; and in all cases of debt or contract the decision of the warden or assessors as hereinafter provided for shall be final. [cf. 37 Vic. No. 13 (N.S.W.), secs. 68, 69; 62 Vic. No. 24 (Q.), secs. 103, 104; 56 & 57 Vic. No. 587 (S.A.), sec. 18; 57 Vic. No. 24 (Tas.), secs. 147, 148; 59 Vic. No. 40 (W.A.), secs. 52, 55; 62 Vic. No. 38 (N.Z.), sec. 254].

Causes of action
not to be
divided.

Ib. s. 178.

217. It shall not be lawful for any complainant to divide any claim for the purpose of bringing two or more suits before a warden; but any complainant may in any case of debt or contract abandon the excess of his claim beyond One hundred pounds, and shall on proving his case recover to an amount not exceeding that sum; and the decision of the warden upon the complaint of such complainant shall be for that amount, and in full discharge of all demands in respect of such claim, and shall be final.

No costs in
Court of Mines
where no more
than one
hundred pounds
recovered unless
&c.

Ib. s. 179.

218. If on the hearing of any case in the Court of Mines in which the demand shall be in respect of a debt or contract only the plaintiff shall not recover more than One hundred pounds, he shall not, though succeeding, be entitled to receive any costs other than he would have been entitled to had he proceeded before a warden, unless the judge shall certify that the case was one which from special circumstances it was proper should be brought in such court.

Proceedings
before warden to
be commenced
by summons.

Ib. s. 180.

Twenty-second
Schedule.

Twenty-third
Schedule.

219. Every such proceeding as aforesaid before the warden shall be commenced by a summons, which, if the proceeding be for the recovery of any land race dam or reservoir or in respect of any encroachment or trespass thereon, shall be in the form in the Twenty-second Schedule hereto; and if for any other purpose, in the form of the Twenty-third Schedule hereto; and every such summons shall be issued by the warden upon the application of any person to him therefor, and shall be filled up according to the nature of the applicant's case, and shall require the defendant to appear before the said or some other warden on a day to be named and inserted in the summons by the said warden; and upon the

day named in such summons or upon any adjourned day of hearing which the warden shall direct, and upon proof of such service of such summons as the warden shall think sufficient, he shall proceed to investigate the matter of such complaint; and in the presence of all the parties interested, or of such of them as shall appear to such warden sufficiently to represent all the parties interested, or in the absence of any of the parties interested who having been duly served with such summons shall not appear, shall hear receive and examine evidence and determine such complaint is a summary way with full power to adjourn the hearing of such complaint to any other time or place and with full liberty to the warden to amend such complaint by the addition of any other persons as complainants or defendants or otherwise. [cf. 37 Vic. No 13 (N.S.W.), secs. 70, 71; 62 Vic. No. 24 (Q.), sec. 113; 56 & 57 Vic. No. 587 (S.A.), sec. 20; 59 Vic. No. 40 (W.A.), secs. 53, 54; 62 Vic. No. 38 (N.Z.), secs. 260, 278].

220. The Governor in Council may appoint one or more clerks for each warden, either by the name of such warden or of the districts or places or any of them in or at which such warden shall usually sit; and any such clerk may sign in the name of such warden and issue any such summons as in the last preceding section mentioned, and every such summons so signed and issued shall be deemed and taken to be issued by such warden within the meaning of the said section. [cf. 62 Vic. No. 24 (Q.), sec. 112; 62 Vic. No. 38 (N.Z.), sec. 12].

Appointment of
warden's clerks.
Act No. 446, s. 14.

Clerks may issue
summons.

221. Any warden may at any time either before or at the hearing of any summons if satisfied by affidavit that any defendant named in such summons cannot after diligent inquiry be found, or cannot from any cause by reasonable exertion be served with such summons, order that service of such summons upon such person or in such manner as by such order shall be directed shall be deemed good service upon such defendant, and if necessary may postpone the hearing of such summons to allow of substituted service, and service of such summons in the manner directed by such order shall be good service to all intents and purposes. [cf. 62 Vic. No. 24 (Q.), sec. 124; 62 Vic. No. 38 (N.Z.), sec. 278].

Warden may
order substituted
service of
summons.
Ib. s. 15.

Act No. 446, s. 16.

Warden may amend complaint by striking out co-plaintiff.

222. Any warden may upon the hearing of any summons amend the same by striking out any one or more of the complainants upon such terms as to costs or otherwise as to such warden shall seem fit. [cf. 62 Vic. No. 38 (N.Z.), sec. 268].

Warden to keep a register of complaints.

"*Mining Statute 1865,*" s. 181.

Twenty-fourth Schedule.

223. Every warden shall keep a register in the form in the Twenty-fourth Schedule to this Act; in which he shall enter the several complaints laid before him with the names and the last-known place of abode of the parties, the nature of the relief sought, and where the claim is pecuniary the amount sought to be recovered; and every one of such complaints shall be numbered in every year according to the order in which they shall be entered. [cf. 37 Vic. No. 13 (N.S.W.), sec. 72; 59 Vic. No. 40 (W.A.), sec. 56.]

Complainant to value his demand and defendant may pay to the warden.

Ib. s. 182.

224. Every person who shall obtain a summons from a warden shall at the time of obtaining the same specify the amount sought to be recovered by such summons so far as the demand shall be pecuniary, and such amount shall be entered in the said register in the proper column for that purpose; and it shall be lawful for the defendant at any time before the said summons shall be heard to pay to the warden such amount together with the costs incurred by the complainant in respect thereof up to the time of such payment and of delivering the notice next hereinafter mentioned; and notice of such payment shall be communicated by the warden to the complainant by causing the same to be delivered at his usual or last-known place of abode or business, and the said amount shall be paid to the complainant and the said costs to the complainant or his attorney; and after such payment no other proceeding shall be brought in any court in respect of the demand in satisfaction of which such amount shall have been so paid. [cf. 62 Vic. No. 24 (Q.), sec. 115; 37 Vic. No. 13 (N.S.W.), sec. 73; 59 Vic. No. 40 (W.A.), sec. 57; 62 Vic. No. 38 (N.Z.), sec. 278].

Payment to warden of less than the demand.

Ib. s. 183.

225. Any defendant in any proceeding before a warden for or which shall include a money demand may, at any time before the summons shall be heard, pay to the warden such sum of money as he shall think a full satisfaction for such demand together with the costs incurred by the complainant up to the time of such payment and of delivering the notice next hereinafter mentioned;

and notice of such payment shall be communicated by the warden to the complainant by causing the same to be delivered at his usual or last-known place of abode or business, and the said sum of money shall be paid to the complainant and the said costs to the complainant or his attorney; but if the complainant shall elect to proceed and shall recover no further sum in respect of such money demand than shall have been so paid to the warden, he shall pay to such defendant the costs incurred by him in the said proceeding after such payment, and the warden may decree the same accordingly, [cf. 37 Vic. No. 13 (N.S.W.), sec. 74; 59 Vic. No. 40 (W.A.), sec. 58].

226. [Repealed and re-enacted by No. 1514, sec. 66] :—226. It shall be lawful for the Governor in Council to make regulations prescribing what fees and sums of money shall be taken in proceedings before a warden and from time to time to lessen or increase the same. Such fees and sums of money shall be paid in the first instance by the person by whom or on whose behalf the act or proceeding in respect of which the same are payable is required to be done and shall in the discretion of the warden be deemed to be a part of the costs of the hearing. [cf. 62 Vic. No. 38 (N.Z.), sec. 278].

227. No complaint shall be dismissed by any warden because of any informality either in the summons itself or in the entry thereof; nor shall any objection be taken or allowed to any such summons or complaint for any alleged defect or misnomer or inaccurate description of any person or place, or on the ground that the complainant shall appear at the hearing of the summons to be entitled to different relief from that which is sought thereby therein; or for any variance between such summons and the evidence adduced on the part of the complainant; but such summons shall be amended by the warden so that the subject matter in dispute between the parties shall plainly appear, and the warden shall proceed to adjudicate according to the rights of the parties. Provided always that if it shall appear to the warden upon the hearing of the case that the defendant has been thereby deceived or misled and that injustice would be done by proceeding at once with the case, it shall be lawful for such warden, on such terms as to costs or otherwise as he shall think fit, to adjourn the further hearing of the case to some future day.

"Mining Statute 1865."

Fee to be paid. Ib. s. 124.

Complaints not to be dismissed for informality. Ib. s. 185.

"*Mining Statute* [cf. 37 Vic. No. 13 (N.S.W.), sec. 75; 62 Vic. No. 38 (N.Z.), 1865." sec. 271; 59 Vic. No. 40 (W.A.), sec. 58].

Warden to make roll of assessors.
Ib. s. 186.

228. Every warden shall make or cause to be made a list of persons not less than fifty in number, or of such a number under and as near fifty as the population of the neighbourhood will permit, of good repute and who shall be holders of miners' rights or business licences residing within the district wherein such warden shall have jurisdiction; and the said list shall be the roll of warden's assessors of such district. [cf. 37 Vic. No. 13 (N.S.W.), sec. 76; 62 Vic. No. 24 (Q.), sec. 109 (1); 59 Vic. No. 40 (W.A.) sec. 71].

Assessors to be summoned by warden.
Ib. s. 187.

229. It shall be lawful for either of the parties previously to the hearing of any such complaint to require from the warden, or for the warden either before or during such hearing to require, that such complaint shall be heard before such warden and four assessors; and thereupon such warden shall summon before him either orally or in writing a sufficient number of the persons whose names shall appear upon such roll as aforesaid, or, if there shall be no such roll or if a sufficient number of persons whose names shall be on such roll cannot be found, then of indifferent persons to act as such assessors, until the number of four assessors shall be obtained. Provided also that before any assessors shall be summoned by any warden, such warden shall demand and receive the sum of Two pounds from the person demanding assessors; and each of the assessors before whom the complaint is heard shall be entitled to receive thereout the sum of ten shillings; and in case the hearing of any complaint shall be adjourned to any future day, the warden shall demand and receive the further sum of two pounds for every such adjournment, and each of the assessors shall be entitled to receive thereout the further sum of ten shillings. Provided that where the warden without a requisition from either of the parties shall summon assessors, the warden shall before the hearing demand and receive from the complainant the sum of two pounds as aforesaid and also in case of any such adjournment such further sum of two pounds for the payment of such assessors at the rate aforesaid; and any part of any of such sums which shall not be required for the payment of assessors shall be returned to the complainant, and the residue thereof shall eventually be paid as

Fees to assessors.

part of the cost of the proceeding by such of the parties as the warden shall in that behalf direct. [cf. 37 Vic. No. 13 (N.S.W.), secs. 76, 93 ; 62 Vic. No. 24 (Q.), sec. 109 (2), (6) ; 57 Vic. No. 24 (Tas.), sec. 151 ; 59 Vic. No. 40 (W.A.), secs. 72, 73, 74 ; 62 Vic. No. 38 (N.Z.), sec. 263].

230. Either party shall be admitted to challenge any number of persons called as assessors not exceeding two without assigning cause, and any additional number provided he assigns of his challenge a cause certain ; and the truth of such challenges shall be inquired of by the warden. [cf. 62 Vic. No. 24 (Q.), sec. 109 (4) ; 59 Vic. No. 40 (W.A.), sec. 75].

231. Any person so summoned who without lawful excuse shall neglect or refuse to attend or to be sworn or serve as such assessor shall be fined such sum of money not exceeding Five pounds as such warden shall think fit. [cf. 62 Vic. No. 24 (Q.), sec. 109 (7) ; 57 Vic. No. 24 (Tas.), sec. 152 ; 62 Vic. No. 38 (N.Z.), sec. 264 (3)].

232. Before such warden and assessors shall proceed to hear any such complaint, such warden shall administer to each of such assessors an oath in the form in the Twenty-fifth Schedule to this Act. Provided that if any of such assessors shall be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the warden upon being satisfied of the sincerity of such objection to permit such person instead of being sworn to make his solemn affirmation and declaration in the words contained in the Twenty-sixth Schedule to this Act, which affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form ; and on such oath being administered or affirmation and declaration made, such warden and assessors shall proceed to hear such complaint the matter of which shall be decided by the assessors with the assistance of the warden on any point of law ; and the decision of the majority of them shall have the same force and effect as the decision of such warden if acting alone would have had ; but if after the expiration of two hours from the time at which the case shall have been left to the assessors they shall intimate to the warden that a majority of them cannot agree upon a verdict, then such warden shall himself decide such complaint ; and every such decision shall

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Challenges.
Ib. s. 188.

Fines for non-attendance.
Ib. s. 189.

Oath to be administered and warden and assessors shall proceed to hear and assessors to decide.
Ib. s. 190.
Twenty-fifth schedule.
Twenty-sixth Schedule.

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1865."

be carried into effect by the same or any other warden. [cf. 37 Vic. No. 13 (N.S.W.), sec. 77 ; 62 Vic. No. 24 (Q.), sec. 109 (8); 59 Vic. No. 40 (W.A.), sec. 76].

Inspection may
be demanded.
Ib. s. 191.

233. Either of the parties shall be at liberty, previously to or during the hearing of any complaint, to apply to a warden for inspection to be made by such warden or warden and assessors of any land claim water race drain dam or easement in dispute ; and if the party so applying shall satisfy such warden as to the propriety and reasonableness of his application, such warden, if the case be heard before him alone, shall make such inspection ; but if heard before him and assessors, shall make an order for such inspection by the assessors upon payment to the warden by the party so applying of such sum (if any) and upon such terms as to the said warden shall seem reasonable ; and thereupon the warden and assessors shall make such inspection, and any sum so paid shall be appropriated towards defraying the expenses of the assessors by reason of such inspection as such warden may direct ; or if such warden shall himself think that any such inspection would be proper, he shall if the case be heard before him alone make such inspection ; or if heard before him and assessors, may, and if required by the majority of the assessors shall, make an order therefor, and (in case of inspection by assessors) for payment of the expenses thereof by such of the parties as he shall think right ; and the money paid for such expenses shall eventually be paid as part of the costs of the proceeding by such of the parties as the warden shall in that behalf direct. [cf. 62 Vic. No. 24 (Q.), sec. 118 ; 56 & 57 Vic. No. 587 (S.A.), sec. 23 ; 62 Vic. No. 38 (N.Z.), sec. 265].

Warden may
order a survey
to be made.
Ib. s. 192.

234. If before or during the hearing of any complaint it shall appear to the warden that it will be necessary for a survey to be made of any land or water in dispute, such warden may order either party to cause such survey and a plan thereof to be made ; and the costs thereof shall be deemed to be a part of the costs of the hearing. [cf. 62 Vic. No. 24 (Q.), sec. 119].

Warden's
decision to be
recorded.
Ib. s. 193.
Twenty-seventh
Schedule.

235. A minute of every decision of a warden or of assessors in the form contained the Twenty-seventh Schedule to this Act or to that effect shall on the day of the pronouncing thereof be entered by such warden in the register to be kept as hereinbefore

provided ; and such warden shall make an order in accordance with such decision, and write the same in the said register under the said decision ; and such decision with said order so underwritten shall be signed by the warden, and no formal order or other record of such decision shall be necessary ; and every such entry whether of the decision of a warden or of assessors shall be made in form as the decision of the warden ; and the expression " decision of a warden " where it occurs in this Part of this Act shall (if not inconsistent with the context or subject-matter) be taken to include the decision of assessors. A copy of such minute or order shall on demand be given to any of the parties interested therein ; and the decision of a warden shall be binding and conclusive on all parties, unless in cases where on appeal therefrom (where such appeal shall be permitted) the same shall be reversed or varied ; and a document purporting to be any such copy, signed and certified as a true copy by the warden who shall have the custody of such register describing himself as having such custody, shall at all times be admitted in all courts and places whatsoever as evidence of such decision or order and of such custody without any further proof. [cf. 37 Vic. No 13 (N.S.W.), sec. 78 ; 56 & 57 Vic. No. 587 (S.A.), sec. 21 ; 59 Vic. No. 40 (W.A.), sec. 61 ; 62 Vic. No. 38 (N.Z.), sec. 272].

236. It shall be lawful for any warden, upon such terms (if any) as to payment of costs or otherwise as such warden shall think fit, to grant as often as such warden shall deem proper a rehearing of any complaint decided by him or by assessors before him ; and for that purpose (if necessary) to set aside any decision or order made on such complaint or upon any rehearing thereof. [cf. 62 Vic. No. 38 (N.Z.), sec. 279].

Warden may grant a rehearing.
Ib. s. 194.

Provided that within seven days after such decision shall have been made, the party applying for such rehearing shall serve upon the opposite party a notice that the application therefor will be made at the expiration of two days from the day of the service of such notice or on the first day thereafter on which the same can be heard ; and upon the hearing of such application the warden shall fix the time and place for such rehearing if the same shall be granted, and direct such notice thereof to be given and in such manner as he shall think right to any of the parties.

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1865."

It shall be lawful for the warden to direct or for either of the parties to require that such rehearing shall be heard before the warden and four assessors ; provided that in case of either of the parties so requiring, such party shall require the same at the time the rehearing shall be granted or at such other time as the warden shall permit, and shall also then lodge with the warden the sum of two pounds for the assessors, and the provisions hereinbefore contained as to hearings before wardens and assessors shall be applicable to rehearings before them.

Warden may
state special
case.

On any proceeding before a warden or warden and assessors it shall be lawful for such warden (if he shall think fit) to reserve any question in the form of a special case for the opinion of the Supreme Court ; and in such case no order shall be made in respect of any matter on which such question shall have been reserved until such opinion shall have been given ; and every such special case shall after it shall have been prepared by such warden be transmitted by him to the Prothonotary of the Supreme Court, who shall cause the same to be set down for argument before the said Supreme Court, whose opinion when given shall be drawn up and transmitted by said master to the said warden, who shall make his order in accordance with such opinion. And whenever any such special case shall have been reserved, it shall be lawful for the warden who shall have reserved the same, on the application of any of the parties interested in such case, to make such order for an injunction or receiver or payment of money into the hands of the said warden or otherwise and upon such terms as such warden shall think proper. [cf. 37 Vic. No. 13 (N.S.W.), sec. 79 ; 56 & 57 Vic. No. 587 (S.A.), sec. 128 ; 57 Vic. No. 24 (Tas.), sec. 159 ; 59 Vic. No. 40 (W.A.), sec. 62 ; 62 Vic. No. 38 (N.Z.), sec. 280].

In case of a
special case an
injunction &c.
may be had.

Duty of warden
and assessors
when proceeding
is for recovery
of land &c.
Ib. s. 195.

237. In case any such proceeding before a warden or warden and assessors shall be for the recovery and possession of any land water race drain dam or reservoir or any share therein, such warden or assessors shall determine the right to the same and fix the boundaries of any such land or the limits and quantity to be taken by either of the parties of such water, if necessary so to do for the purpose of terminating the dispute ; and if the complainant shall succeed, shall determine whether any and what sum in the nature of mesne profits should be paid to the complainant ;

and in the event of the complainant so succeeding, the warden shall order possession of such land race drain dam reservoir or water or share to be delivered to the complainant and any such sum to be paid to him ; and shall, or any other warden may, cause such complainant to be put into possession of any such land race drain dam reservoir or water or share as aforesaid, and (if necessary) cause or order any defendant his servants buildings fixtures implements goods and chattels to be removed therefrom or from such of them as such share or interest shall be held in or from the using of such water. [cf. 37 Vic. No. 13 (N.S.W.), sec. 80 ; 62 Vic. No. 24 (Q.), sec. 128].

238. In case any such proceeding before a warden or warden and assessors shall be in respect of the right to divert any water or to remove any reservoir race drain or dam, such warden or assessors shall determine such right ; and if the complainant shall succeed, such warden shall declare him at liberty to divert or remove the same, and may make an order enjoining any defendant from preventing such diversion or removal. [cf. 37 Vic. No. 13 (N.S.W.), sec. 81 ; 62 Vic. No. 24 (Q.), sec. 129].

Duty of warden and assessors when proceeding is as to right to divert water &c.
Ib. s. 196.

239. In case any such proceeding shall be in respect of any encroachment or trespass upon or any unlawful interference with or injury to any such land race drain dam reservoir or water, such warden or assessors shall determine the right to the same and fix the boundaries of any such land or the limits or quantity to be taken by either of the parties of such water, if necessary so to do for the purpose of terminating the dispute ; and at the same time assess the amount to be paid to the complainant by way of damages (if any) by reason of any such encroachment trespass interference or injury found to have been committed ; and the warden shall order such damages to be paid accordingly, and that the person found to have encroached or trespassed interfered or injured as aforesaid do cease from such encroachment trespass interference or injury ; and it shall be lawful for the same or any other warden to cause the person so found to have encroached trespassed interfered or injured his servants implements goods and chattels to be removed from the land race drain dam reservoir or water so encroached or trespassed upon interfered with or injured or from the using of such water, and to cause such complainant to be put into possession thereof. [cf. 37

Duty of warden and assessors when proceeding is in respect of encroachment.
Ib. s. 197.

"Mining Statute 1865." Vic. No. 13 (N.S.W.), sec. 82 ; 62 Vic. No. 24 (Q.), sec. 130 ; 62 Vic. No. 38 (N.Z.), sec. 266].

Duty of warden and assessors when proceeding in respect of money due on a contract.

Ib. s. 198.

240. In case any such proceeding shall be in relation to any debt or contract or to money due in respect of any such land or water or any share or interest therein, or in respect of any gold or other metals or minerals, or in relation to any such gold metals or minerals or to the amount of any contribution or other sum of money (suits for the recovery of which the warden is hereby authorized to hear and determine), the warden shall order any money or damages or gold or other metals or minerals which he or any such assessors shall find due or payable or deliverable by either of the parties to the other of them to be paid or delivered. And in case such proceeding shall be in respect of money due or gold or other metals or minerals deliverable upon a mining partnership account or accruing to the complainant from any mining partnership adventure or interest, the warden or the assessors shall take the account of such partnership adventure or interest, so far as shall be necessary to ascertain what sum or amount of gold or other metals or minerals (if any) shall be so due or accruing ; and the warden shall order any such sum or gold to be paid or delivered. [cf. 37 Vic. No. 13 (N.S.W.), sec. 83 ; 62 Vic. No. 24 (Q), secs. 131, 132 ; 57 Vic No Vic. 24 (Tas.), sec. 150].

Or in respect of a partnership.

Constables &c. to assist.

Ib. s. 199.

241. All constables and peace officers shall within their several jurisdictions aid and assist the warden in the execution of any of the duties imposed upon him by any of the preceding sections.

Mode of enforcing warden's decision in case of debt &c.

Ib. s. 200.

242. Whenever in or by any decision in any of the said cases before a warden or a warden and assessors any sum of money shall be awarded by way of debt damages or costs or otherwise and the same shall not be forthwith paid, such warden, or any other warden on production to such other warden of a copy of such decision signed and certified as a true copy by the warden who shall have the custody of the register (describing himself as having such custody) in which the minute of such decision shall be entered as hereinbefore directed, on the application of the person entitled to receive such sum, or of any attorney on his behalf, shall grant to the party so applying a warrant under his hand in the form in the First Part of the Sixteenth Schedule

Sixteenth Schedule First Part.

hereto. [cf. 37 Vic. No. 13 (N.S.W.), sec. 84; 62 Vic. No. 24 (Q.), ^{"Mining Statute 1865."} sec. 133; 56 & 57 Vic. No. 587 (S.A.), sec. 19; 57 Vic. No. 24 (Tas.), sec. 155; 59 Vic. No. 40 (W.A.), secs. 70, 80; 62 Vic. No. 38 (N.Z.), sec. 269].

Any bailiff of any Court of Mines to whom such warrant shall be delivered for execution, and all constables and other peace officers within their several jurisdictions, shall do and perform all things in respect of such warrant which such bailiff constables and peace officers are hereinbefore required to do and perform in respect of a warrant issued out of a Court of Mines in the case of the non-payment of money decreed or ordered to be paid by such court.

Every such bailiff may by virtue of such warrant seize and take such property as and dispose thereof in the manner he could seize take and dispose thereof by virtue of such warrant issued out of the Court of Mines, and may and shall pay and deliver to the party to whom the warden shall have granted such warrant any money or bank notes which shall be seized thereunder or a sufficient part thereof, and shall hold any cheques bills of exchange promissory notes bonds specialties or other securities for money which shall have been so seized or taken as a security or securities for the amount directed to be levied by such warrant or so much thereof as shall not have been otherwise levied or raised for the benefit of the person to whom such warrant shall be granted, who may sue in the name of the party against whom any such warrant shall have issued or in the name of any person in whose name such party might have sued for the recovery of the sum or sums secured or made payable thereby when the time of payment shall have arrived; and all powers vested in the person against whom such warrant shall have issued which such person might legally execute for his own benefit shall be and are hereby by virtue of such warrant vested in the said bailiff, to be by him executed for the benefit of the party suing out the warrant.

Provided that the warden who shall be applied to to issue any such warrant may withhold the issuing of the same, if he shall consider it just or reasonable so to do, until after the expiration of three days from the day on which such decision shall have

“*Mining Statute* 1865.” been made. Provided also that whenever in any of the cases aforesaid any order shall be made by a warden other than or besides an order for the payment of money, the same may be enforced under the provisions of section two hundred and forty-nine hereof, but without prejudice to any other mode by which the same may under the provisions hereof be enforced.

(b) *Special Powers and Duties.*

Auriferous earth may be seized.
Ib. s. 201.

243. Notwithstanding any of the provisions hereinbefore contained, it shall be lawful for such warden, if he shall think fit, at the time of the making of any such decision by him or by any such assessors, to order that any auriferous earth in the possession of and belonging to the party by whom payment of any sum in respect of any such debt damages or costs shall be ordered to the extent in value of such sum (such value to be fixed by such warden or assessors) shall be delivered up to the party entitled to such sum by way of satisfaction or in part satisfaction thereof; and such warden shall forthwith cause such earth to the extent aforesaid to be seized and delivered accordingly; and thereupon a minute of such order in the form contained in the Twenty-seventh Schedule to this Act or to that effect shall be entered and signed in the register aforesaid; and a warrant for the balance only of such sum after deducting the value of the earth seized and delivered as aforesaid shall be granted by such warden. [cf. 37 Vic. No. 13 (N.S.W.), sec. 85; 56 & 57 Vic. No. 587 (S.A.), sec. 22; 57 Vic. No. 24 (Tas.), sec. 148; 59 Vic. No. 40 (W.A.), sec. 63; 62 Vic. No. 38 (N.Z.), sec. 265].

Twenty-seventh Schedule.

Warden may authorize entry on adjacent claim.
Ib. s. 202.

244. It shall be lawful for any warden in his discretion, upon the application of any person claiming to be legally or equitably interested in any claim or in any land comprised in any lease (granted under the provisions of any Act authorizing the granting of leases for mining for gold or for metals or minerals other than gold) or in any other land adjoining any claim or land comprised as aforesaid, by writing under the hand of such warden to authorize the applicant together with a mining surveyor or some experienced miner to enter upon any claim or land (whether at the time of such application alienated from the Crown or not if any mining operations shall be then carried on on such land)

adjoining such first-mentioned claim or land or other land for the purpose of ascertaining whether the owner or occupier of the claim or land so to be entered upon is encroaching on said first-mentioned claim or land or other land. [cf. 37 Vic. No. 13 (N.S.W.), sec. 86 ; 62 Vic. No. 24 (Q.), sec. 121 ; 57 Vic. No. 24 (Tas.), sec. 194 ; 59 Vic. No. 40 (W.A.), sec. 64].

<sup>“Mining Statute
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It shall be lawful for the persons so authorized to enter upon the claim or land described in such order, and to descend any shafts or mine, and for such purpose to use the engines and other machinery ordinarily employed for that purpose by the persons whose shaft or mine shall be descended, and to make such plans and sections of the claim or land entered upon and of any drives or other works therein as shall be necessary for the purpose aforesaid. [cf. 62 Vic. No. 24 (Q.), sec. 122 ; 59 Vic. No. 40 (W.A.), sec. 65].

Every such applicant and mining surveyor or miner shall, before entering on such claim or land, make a declaration before such warden (who is hereby authorized to take the same) that he the said applicant surveyor or miner will not (except as a witness in a court of justice) without the consent in writing of the owner or occupier of the claim or land to be entered upon divulge or cause to be divulged to any person whomsoever any information obtained upon or by such entry, save only as to whether such owner or occupier is encroaching on the said first-mentioned claim or land ; and every person who shall act contrary to such declaration shall forfeit and pay any sum not exceeding Fifty pounds.

245. It shall be lawful for any warden upon the application of any person claiming to be legally or equitably interested in any land claim water race drain dam reservoir or easement, such application to be made on notice served twenty-four hours at least before the time for the making thereof on the parties interested in opposing the same or such of them as shall appear to such warden sufficiently to represent the parties so interested, in the presence of such parties or such of them as aforesaid or in the absence of any of them upon whom service of such notice shall be proved to the satisfaction of the warden, to hear receive and examine evidence.

Warden may
grant injunction
on notice.
Ib. s. 203.

"Mining Statute
1865."

And thereupon, if he in his discretion shall think fit, and upon such terms (if any) as he may consider just, by order under his hand to enjoin any person named in such order from encroaching upon occupying using or working such land claim water race drain dam reservoir or easement, or from seeking for washing out winning extracting or removing any earth gold or metal or mineral other than gold taken from such land, or from selling or disposing of or damaging or otherwise interfering with such land claim water race drain dam reservoir easement or earth gold metal or mineral or any share or interest therein respectively, or from doing any act whereby the right title or interest of such applicant in or to the same might be affected; and every such order shall operate and be in force for such a period as shall be named therein unless the same shall be sooner discharged by the warden making the same or by the judge of any Court of Mines.

Provided that if endeavours reasonable in the opinion of the warden to serve such of the said parties as in his opinion would be necessary to represent the parties so interested shall be proved to the satisfaction of such warden to have failed, it shall be sufficient service of such notice if the same shall be advertised in some newspaper circulating in, or if none in, then in the newspaper or one of the newspapers circulating nearest to, the district in which the subject-matter of the application shall be situated, and which shall be published twenty-four hours at least before the time for the making of the application; and on every such application the said warden shall make such order as to costs as to him shall seem just. [cf. 37 Vic. No. 13 (N.S.W.), sec. 87; 62 Vic. No. 24 (Q.), sec. 123; 59 Vic. No. 40 (W.A.), sec. 66; 62 Vic. No. 38 (N.Z.), sec. 268].

Warden may
grant injunction
for seven days
without notice.

Ib. s. 204.

246. If by reason of the pressing emergency of any particular case it shall seem proper to the warden so to do, he may on the application of any such person as last aforesaid but without any notice, by order under his hand grant such injunction as last aforesaid; but to be in force for a period of seven days only inclusive of the day upon which such order shall have been made, or until the same shall by the said warden be discharged. And no second order for an injunction shall be made for the same cause under this section; but any person at whose instance any injunction shall have been granted under this section shall be

at liberty, at any time before the expiration of the said period of seven days as well as thereafter, to apply under the provisions of the section next preceding for an injunction for any longer period. [cf. 37 Vic. No. 13 (N.S.W.), sec. 88 ; 62 Vic. No. 24 (Q.), sec. 125 ; 59 Vic. No. 40 (W.A.), sec. 67 ; 62 Vic. No. 38 (N.Z.), sec. 268].

247. It shall be lawful for any warden, upon the application of any party to any proceeding on summons before him (such application to be made on notice served twelve hours at least before the time for the making thereof on the parties interested in opposing the same or such of them as shall appear to such warden sufficiently to represent the parties so interested) in the presence of such parties or such of them as aforesaid or in the absence of any of them upon whom service of such notice shall be proved to the satisfaction of such warden, by order under his hand to direct any person party to or interested in such proceeding to deposit, within the time or times mentioned in such order with any person or at any place named in such order, in the name of such warden or of any other person mentioned in such order to abide the decision of such warden or of any assessors who may be summoned in any such proceeding, any earth gold or any metal or mineral other than gold or any money or other chattel described in such order which may then be or which at any time before the final termination of such proceeding may come into the possession power or control of such person party to or interested in such proceeding, and the right to which will in the opinion of such warden be put in issue in the course of such proceeding. Provided that service of the notice hereby required may be made by advertisement under the circumstances and in the manner mentioned in the section next preceding but one as to the notice by that section required. [cf. 37 Vic. No. 13 (N.S.W.), sec. 89 ; 62 Vic. No. 24 (Q.), sec. 126 ; 62 Vic. No. 38 (N.Z.), sec. 264].

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Warden may order deposit of gold &c.
Ib. s. 205.

248. Every order made by a warden under any of the four next preceding sections may be in the form contained in the Twenty-eighth Schedule to this Act or to that effect, without any further recital than is directed by such form ; and every such order shall (except the warden shall otherwise order) be served by delivering a copy to the person to be bound thereby and at the same time showing the original order if such person shall require to see the

Form of order.
Ib. s. 206.
Twenty-eighth Schedule.

“Mining Statute same ; and every such order shall be entered by the warden who shall have made the same in the register to be kept by him as aforesaid. Provided that if the warden shall see fit so to order, it shall be sufficient service of any injunction order, or of any order directing gold metals or minerals or other property to be deposited, to publish a copy of such order in such newspaper and to affix a copy thereof in such conspicuous place at or near the property in dispute (if any) as the warden shall direct. [cf. 37 Vic. No. 13 (N.S.W.), sec. 90].

On disobedience of orders other than for the payment of money party may be summoned and committed.

Ib. s. 207.
Nineteenth Schedule.

249. In case any person named in any of such orders (not being an order for the payment of money) and intended to be bound thereby shall disobey the same, it shall be lawful for any person entitled to the benefit thereof to obtain a summons, in the form in the Nineteenth Schedule to this Act, from the warden by whom such order shall have been made or any other warden, requiring the party so disobeying to appear at such time and place as shall be directed by the said summons before the same or any other warden to show cause why he should not be committed to prison for disobedience of such order, and stating in what respects the same has been disobeyed ; and such summons may by order of such warden be made returnable at any place before the same or any other warden ; but without such order such summons shall be made returnable at the place where and before the warden by whom it shall be issued ; and such summons shall be served personally or at such place or upon such person or in such other manner as the warden may under the special circumstances of the case direct. If the person so summoned shall appear in pursuance of such summons or shall not attend as required by such summons and no sufficient excuse shall be shown for his not so attending, it shall be lawful for the warden before whom such summons shall be returnable to inquire into the matters mentioned in such summons on affidavit or on the oath of one or more than one credible witness, or upon both oath and affidavit ; and if it shall appear to such warden that the person so summoned has in fact knowingly disobeyed such order, it shall be lawful for such warden, if under all the circumstances of the case he shall think fit, to order that such person be committed to prison ; and thereupon the said warden shall without any previous notice or summons to the person so ordered to be

committed issue a warrant in the form in the Twenty-ninth Schedule to this Act or to the like effect; and the bailiff of the Court of Mines of the district in which such order shall have been made and the keeper of the gaol to whom such warrant shall be directed shall respectively execute and obey the said warrant; and all constables and other peace officers within their several jurisdictions shall aid and assist in the execution of the same. [cf. 62 Vic. No. 38 (N.Z.), sec. 275].

250. Whenever any person shall be in custody under any such warrant as last aforesaid, it shall be lawful for the officer in whose custody such person may be, on receiving an order for that purpose under the hand of the warden by whom such order of commitment shall have been made or of a judge of a Court of Mines, from time to time to bring such person before such warden or judge; and it shall be lawful for such warden or judge either verbally to remand such person to his former custody; or, if it shall appear to such warden or judge that such person has either performed the order for disobedience of which such person shall have been committed or has paid to the person obtaining such order of commitment or to the warden by whom such order of commitment was made or to the clerk of the court of which such judge shall be judge in behalf of such last-mentioned person full compensation for the breach of such part of the order as can no longer be performed together with all costs subsequent to the pronouncing of such order, including the costs of obtaining the commitment or that otherwise under the special circumstances of the case it would be proper so to do, verbally to order the person so in custody to be forthwith discharged on such condition as to performance of so much of the order as then remains to be and is capable of being performed as such judge or warden shall direct, and such person shall be discharged accordingly; or it shall be lawful for such warden or judge on being satisfied of the matters aforesaid, instead of causing the person so in custody to be brought before him, by order under his hand directed to such officer to order the immediate discharge of such person, who shall be discharged accordingly. [cf. 62 Vic. No. 38 (N.Z.), sec. 275].

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Twenty-ninth Schedule.

Prisoner may be discharged on performance. *Ib. s. 208.*

Order may be *ex parte.* *Ib. s. 209.*

251. Any such order of commitment as last aforesaid may (if the special circumstances of the case shall appear to any such warden to warrant it) be made by such warden *ex parte* and

“ Mining Statute 1865.” without notice, on proof by affidavit only of the wilful disobedience of the order for the disobeying of which such order of commitment shall be applied for; and upon such *ex parte* order being made under the hand of the said warden, such warrant as aforesaid may be issued, and the person ordered to be committed may be dealt with as if an order of commitment had been made as hereinbefore directed.

Certificate of decision of warden may be filed in Court of Mines.

Ib. s. 210.

Thirtieth Schedule.

Sixteenth Schedule Part II.

252. Whenever any sum of money awarded by way of debt damages or costs in or by any decision of any warden shall remain unsatisfied in the whole or in part, the warden who shall have the custody of the register in which such decision shall be registered shall, on the application of the person entitled to receive such debt damages or costs or of any attorney on his behalf, grant to the party so applying a certificate in the form contained in the Thirtieth Schedule to this Act or to the like effect; and it shall be lawful for such person to file the said certificate with the clerk of the Court of Mines of the district in which such decision shall have been made; and thereupon such proceedings may be had as hereinbefore provided for in the event of any such certificate being so filed. Provided that on such application as aforesaid the warden shall grant to the person so applying a certificate in the form in the Second Part of the Sixteenth Schedule to this Act, directed to the clerk of any Court of Mines; and such certificate if forwarded to such clerk shall be filed by him; and thereupon execution may issue as upon a decree or order of the Court to the clerk of which such certificate shall be directed. Provided also that the signature to such certificate, purporting to be the signature of a warden having jurisdiction within the district with the clerk of the Court of Mines of which the certificate shall be filed, shall be sufficient warrant to such clerk to act upon such certificate.

Mode of enforcing warden's order where not specially provided for.

Ib. s. 211.

253. Whenever any warden is empowered or required by this Part of this Act to cause any act to be performed, and the mode of performing such act is not otherwise expressly provided for, it shall be lawful for any person verbally authorized by such warden and in his presence or for any peace officer or constable authorized in writing under the hand of such warden to perform such act; and all peace officers and constables shall if thereunto required aid and assist any warden or person authorized as afore-

said in the performance of his duty under this Part of this Act. “Mining Statute 1865.”
 [cf. 37 Vic. No. 13 (N.S.W.), sec. 92; 62 Vic. No. 24 (Q.), sec. 34].

(c) *Appeals.*

254. Any person who shall be desirous of appealing from the decision of a warden upon any hearing or rehearing of a case before him or before him and assessors in cases where such decision is not hereby declared to be final, and whether the decision be a dismissal of the case or otherwise, may appeal from the same to the Court of Mines of the district within which such decision shall have been pronounced at that sitting of such court which next after the expiration of one month from the day of the making of such decision shall be held nearest to the place at which such decision shall have been made. Provided that such person shall within ten days from the day of the making of such decision deposit with the clerk of such court at the place where such sitting is to be held the sum of ten pounds to abide the costs of such appeal, and shall also within the same ten days serve upon the parties interested in supporting such decision or upon such of them as shall appear to such court to represent all the parties interested or in case no such person can be found upon the warden before whom or before whom and assessors the case in which such decision shall have been made was heard, a notice in writing in the form in the Thirty-first Schedule to this Act stating the intention to appeal and the grounds of such appeal and the time and place at which such appeal will be heard. [cf. 37 Vic. No. 13 (N.S.W.), sec. 106; 62 Vic. No. 24 (Q.), sec. 141; 56 & 57 Vic. No. 587 (S.A.), sec. 25; 57 Vic. No. 24 (Tas.), sec. 161; 59 Vic. No. 40 (W.A.), sec. 86; 62 Vic. No. 38 (N.Z.), secs. 281, 282, 283].

Appeal.
Ib. s. 212.

Act No. 446, s. 18.

Thirty-first
Schedule.

255. If either party to any proceeding in a warden's court shall appear by attorney, notice of appeal may be served upon such attorney. [cf. 57 Vic. No. 24 (Tas.), sec. 162; 62 Vic. No. 38 (N.Z.), sec. 283].

Service of notice
of appeal.
Ib. s. 19.

256. Any warden may if satisfied by affidavit that any person named as a respondent in any notice of appeal under the last preceding section but one cannot after diligent inquiry for him be found, or cannot from any cause by reasonable exertion be served

Warden may
order substituted
service of
notice of appeal.
Ib. s. 20.

Act No. 446.

with such notice of appeal within the time by this Part of this Act limited for service thereof, order that service of such notice of appeal upon such person or in such manner as by such order shall be directed shall be deemed good service upon such respondent, and service of such notice of appeal in the manner directed by such order within the time limited by this Part shall be good service to all intents and purposes. Before any appeal shall be heard as provided for in the last but one preceding and next following sections hereof the appellant shall deliver to the clerk for the use of the court, or shall see that there be provided for the use of the court a copy of the complaint before the warden and a copy of the decision thereon which is appealed against. [cf. 62 Vic. No. 38 (N.Z.), sec. 286].

Copy of complaint and decision of the warden to be delivered on appeal.

Court to make order on appeal.
"Mining Statute 1865," s. 213.

257. Such appeal shall be heard at such sitting of such court or at such other place within the mining district and at such time as the judge of such court shall by writing under his hand direct; and such court shall proceed to make an order reversing or varying such decision or dismissing such appeal; and all such orders shall be final and conclusive on the parties; and the judge shall (if necessary) order payment of money or the delivery of possession of any claim land race drain dam reservoir or water gold or other metals or minerals or other property to the person who was the complainant before the warden, or restitution of any claim land or water gold or other metals or minerals or other property as the case may require; and in and by such order the said court may make such order with respect to the costs of the appeal and of the proceeding appealed from as such court shall think fit. [cf. 62 Vic. No. 24 (Q.), sec. 142; 57 Vic. No. 24 (Tas.), sec. 165; 59 Vic. No. 40 (W.A.), sec. 87; 62 Vic. No. 38 (N.Z.), sec. 290].

Act No. 446, s. 21.

Agreement to bar appeal.
"Mining Statute 1865," s. 214.

258. Previously to the hearing of any complaint, the parties thereto may agree to accept the decision of the warden or assessors as the case may be as final; and a memorandum of every such agreement shall be entered by the warden in the register to be kept by him as hereinbefore provided; and no appeal shall in such case be made from the decision of the warden or of the assessors as the case may be. [cf. 37 Vic. No. 13 (N.S.W.), sec. 107; 62 Vic. No. 24 (Q.), sec. 117; 57 Vic. No. 24 (Tas.), sec. 156].

259. If upon the hearing of such appeal the subject-matter of the dispute shall appear to the court before which the appeal shall be heard not to exceed in value twenty pounds, the appellant shall not although he succeeds be entitled to receive any costs of such appeal from the opposite party, unless the court shall be of opinion that the special circumstances of the case entitle the appellant to costs. [cf. 37 Vic. No. 13 (N.S.W.), sec. 108 ; 62 Vic. No. 24 (Q.), sec. 144].

"Mining Statute 1865," s. 215.

No costs on appeal where less than twenty pounds recovered unless judge under special circumstances shall allow them.

260. Every such appeal shall (unless an issue shall be directed or the trial of any fact by assessors be required as hereinafter mentioned) be heard and determined by the judge alone ; and no ground of appeal, excepting those stated in the notice of appeal, shall be entered upon, unless the judge shall allow either before or at the hearing other grounds to be added, upon such terms as to adjournment costs or otherwise as he may think fit. [cf. 37 Vic. No. 13 (N.S.W.), sec. 109 ; 62 Vic. No. 24 (Q.), sec. 145 ; 62 Vic. No. 38 (N.Z.), sec. 290].

Appeal to be heard by judge alone unless assessors required.

Ib. s. 216.

No ground of appeal except those stated to be entered on.

261. Upon the hearing of any such appeal the court may (if it shall think fit) direct an issue to be tried at such time as it shall appoint before such court and six assessors ; and either of the parties to any such appeal may require that some question of fact material to the issue in the appeal shall be tried before such court and six assessors ; the verdict of a majority of which assessors shall in both cases be received ; and whenever any question of fact shall be tried on the requisition of any of the parties, the court in pronouncing its order on the appeal shall act on the verdict found on such trial ; but whenever an issue shall be tried on the direction of the court, the court in pronouncing such order shall act or not on the verdict found on such trial as it shall think right, and shall have power before pronouncing such order to direct any other trial or trials of such issue. Provided that no appellant shall be entitled so to require, unless at the time of his depositing the said sum of ten pounds with the clerk as aforesaid he shall give notice to such clerk that he does so require ; and in the notice of appeal he shall inform the respondent thereof ; and no respondent shall be entitled so to require, unless ten clear days before the sitting of the court at which the appeal is to be tried he shall give notice to such clerk that he does so require, and serve a notice upon the appellant stating that he has so required.

Assessors may be required.

Ib. s. 217.

"Mining Statute
1865."

Provided also that the party so requiring shall at the time when he shall so require pay into court for assessors, over and above the sum of ten pounds which if appellant he is to deposit with the clerk as aforesaid, the sum of six pounds twelve shillings to be dealt with in like manner as the sum of six pounds twelve shillings to be paid for assessors in original proceedings in the Courts of Mines is hereby directed to be dealt with. [cf. 37 Vic. No. 13 (N.S.W.), sec. 110 ; 62 Vic. No. 24 (Q.), sec. 147].

Provisions as to
issues in original
proceedings in
Courts of Mines
applicable to
issues on appeals.

Ib. s. 218.

262. The provisions of the sections hereof in regard to the trial of issues and of questions of fact in original proceedings in the Court of Mines, and in regard to the persons from whom assessors are to be chosen and to the summoning and other proceedings in respect of assessors, shall be applicable to the trial of such issues and questions of facts in the case of appeals to the Courts of Mines. [cf. 62 Vic. No. 24 (Q.), sec. 148].

In cases of
appeal an
injunction &c.
and stay of
proceedings may
be had.

Ib. s. 219.

263. Whenever any such appeal shall have been brought or be about to be brought, it shall be lawful for the warden from whose decision the appeal shall be or be about to be brought, on the application of any of the parties interested in such appeal, to make such order for an injunction or receiver or payment of money into the hands of the warden to abide the event of the appeal or for stay of proceedings or otherwise and upon such terms as he shall think proper ; but without such order or an order to the same effect by the judge of the court in which the appeal shall be brought, no appeal shall operate as a stay of proceedings ; and such order the said warden may at any time thereafter if he think fit discharge. [cf. 37 Vic. No. 13 (N.S.W.), sec. 111 ; 62 Vic. No. 24 (Q.), sec. 149 ; 57 Vic. No. 24 (Tas.), sec. 167].

Appeals from
wardens not to
lapse by death
cessation or
removal of
judge.

Act No. 446, s. 9.

264. No appeal from the decision of a warden to the Court of Mines of the district within which such decision shall have been pronounced shall be impeded or shall lapse or from the coming into operation hereof shall be deemed to be impeded or to have lapsed in consequence of the office of judge of the said court being vacant by the death removal cessation or resignation of the judge thereof ; but any appeal whether the same shall or shall not have been partly heard may be commenced or prosecuted before the succeeding judge at the same place and as nearly as may be at

the same time as it would have been before the preceding judge Act No. 446.
if remaining in office.

265. Upon the hearing or rehearing of any appeal from a warden or upon any proceeding before a warden or a warden and assessors either party to any such appeal or proceeding may apply to the judge or warden to reserve any question of law in the form of a special case for the opinion of the Supreme Court, which opinion such Supreme Court is to give, and in such case proceedings may be stayed upon such terms as the judge or warden shall think fit until such opinion shall have been given; and every such special case shall after it shall have been prepared by such judge or warden be transmitted by the clerk of the Court of Mines or the warden to the Prothonotary, who shall cause the same to be set down for argument before the said Supreme Court; and whenever any such question shall have been reserved it shall be lawful for the judge or warden who shall have reserved the same on the application of any of the parties interested to make such order for an injunction or receiver or payment of money into court or into the hands of the said warden or otherwise and upon such terms as such judge or warden shall think proper. [cf. 62 Vic. No. 24 (Q.), sec. 136].

Parties may apply to judge or warden to reserve special case for opinion of Supreme Court.

Ib. s. 22.

266. If the judge or the warden shall refuse upon any such application to reserve any such question as aforesaid no order shall be made in respect of any matter on which such special case shall have been applied for until after the expiration of ten days from the day of such refusal, and the costs of and occasioned by such delay shall be in the discretion of such judge or warden.

Proceedings on refusal to reserve special case.

Ib. s. 23.

267. When the judge or the warden shall refuse to reserve any such question as aforesaid the applicant may within ten days after the day of such refusal apply to the Supreme Court for an order *nisi* calling on such judge or warden and also upon the opposite party to show cause why any such question should not be reserved for the opinion of such Supreme Court, and the said Supreme Court may make the same absolute or discharge it with or without costs as it may think proper; and the judge or warden upon being served with any such order absolute shall reserve such question of law accordingly for the opinion of such Supreme Court.

When judge or warden refuses a case the Supreme Court may order one to be stated.

Ib. s. 24.

Act No. 446, s. 25.
 Opinion of the
 Supreme Court
 to be drawn up
 and transmitted
 to Court of Mines
 or warden and
 to be binding on
 all parties.

268. As soon as the opinion of the Supreme Court shall have been given upon any such special case the Prothonotary shall cause the same to be drawn up, and shall transmit the same to the clerk of the Court of Mines or warden; and the judge or warden who shall have reserved the same shall make his order in accordance with the opinion given on such special case, and the Supreme Court may upon the argument of any such special case as aforesaid make such order with respect to costs as it may think proper; and no appeal upon any question of law raised by any such special case shall lie from a warden, or from a warden and assessors, to a Court of Mines against any decision and order made in accordance with any such opinion of the said Supreme Court, but the same shall be binding and conclusive upon all parties.

Mode of
 enforcing
 decision after
 appeal.

"*Mining Statute*
 1865," s. 220.

269. After any appeal against the decision of any warden or assessors shall have been determined, if such appeal shall be dismissed, it shall be lawful for any warden to proceed to enforce such decision in the same manner as such warden might have done if no such appeal had been brought; and in case any such decision shall be varied upon appeal, the decision so varied shall be deemed to be the decision of the warden whose decision shall have been appealed against.

It shall be lawful for any warden to proceed to enforce the decision as so varied in the same manner as if it had been the original decision and no such appeal had been brought. [cf. 37 Vic. No. 13 (N.S.W.), sec. 112].

Provided always that if any decision when so affirmed or varied shall contain an award of debt damages and costs or either of them and the same shall not have been previously paid or satisfied, or in case any decision of the Court of Mines reversing the decision of the warden shall contain an award of debt damages and costs or either of them or an order for payment or repayment of money, and the same shall not forthwith or within the time limited for that purpose be paid or satisfied, it shall be lawful for the clerk of the court, on the application of the person entitled to such debt damages and costs or either of them or to such money and without any summons or notice to the person required to pay the same, forthwith to issue execution for the amount thereof in the same manner as if the same had

been recovered by an original proceeding in the said court ; and in case such court shall order that any money received by any respondent under the decision appealed against shall be paid into court, and the same shall not forthwith or within the time limited for that purpose be paid into court, or in case such court shall decree costs against any party to such appeal and the same shall not be paid within the time limited for that purpose it shall be lawful for the clerk of such court (upon the application of the person entitled to receive the same and without any summons or notice to the person required to pay the same) forthwith to issue execution for the amount thereof in the same manner as upon any decree of the said court for payment of money, or in case the said court of appeal shall order that possession of any such land race drain dam reservoir or water as is hereinbefore mentioned or of any gold or other metals or minerals or of any share or interest therein respectively shall be delivered or restored to any party to the appeal, then it shall be lawful for any warden, and he is hereby required, to cause possession thereof to be delivered or restored to such party, and (if necessary) for that purpose to cause to be removed from any such land race dam reservoir or water any other person his servants goods and chattels ; and all constables and other peace officers shall assist him in doing so.

"Mining Statute
1865."

(3) *Miscellaneous Provisions.*

270. It shall be lawful for any person in custody under any order of commitment made under this part of this Act, upon giving reasonable notice to the person (or to one of such persons if more than one) on whose application such order was granted or if such person or none of such persons can be found to the judge or warden by whom such order was made, to apply in a summary way on affidavit to the Supreme Court for his discharge ; and it shall be lawful for such court in its discretion and on such terms (if any) as he shall think fit, by order under his hand directed to the gaoler or other person in whose custody such applicant may be, to direct that such applicant shall be discharged, and such applicant shall be discharged accordingly. Provided that it shall not be lawful for such court upon such application to inquire into the merits of the decree or original order on which the order of commitment was founded. [cf. 62 Vic. No. 24 (Q.), sec. 270].

Party
imprisoned may
be discharged by
Supreme Court.
Ib. s. 271.

Act No. 446, s. 12.
 Clerk may
 adjourn court in
 absence of
 judge.

271. If the judge of any Court of Mines or any warden shall not arrive at the court-house or place before one o'clock in the afternoon of any day upon which the holding of a Court of Mines or Warden's Court as the case may be at such court-house or place shall have been fixed or to which the sitting of such court shall have been adjourned, the clerk of the Court of Mines or warden's clerk as the case may be shall open such court and adjourn the same to such day as shall be directed by the judge or warden, and in default of such direction or in the event of the death or resignation of the judge or warden, to such day as he shall think fit.

Fees how
 recoverable.
"Mining Statute
1865," s. 222.

272. All fees charges and sums of money which shall or may be imposed or made payable under this Part of this Act, and for which no other mode of recovery shall be directed, shall be recoverable in a summary manner before any justice being a warden. [cf. 37 Vic. No. 13 (N.S.W.), sec. 116].

Documents may
 be in writing or
 print.
Ib. s. 223.

273. All summonses plaints answers notices decrees orders warrants and other documents whatsoever used in any proceedings in any court or before any warden under this Part of this Act or in relation to any such proceedings may be in writing or in print or partly in one and partly in the other, notwithstanding that they or any of them may be hereinbefore directed to be in writing; and the expression "written pleadings" hereinbefore used or in any schedule hereto shall mean pleadings written or printed or partly written and partly printed. [cf. 37 Vic. No. 13 (N.S.W.), sec. 117].

Jurisdiction and
 duties of court
 judges clerks
 and wardens
 under other Acts
 preserved.
Ib. s. 224.

274. The provisions of any Act not hereby or otherwise repealed, conferring any jurisdiction or imposing any duty upon or otherwise relating to any Court of Mines or any judge thereof, or any clerk of such court, or upon any warden existing immediately before the passing of this Act, shall apply to the Courts of Mines and judges and clerks thereof and to the wardens established and appointed under this Act.

Summons to
 witnesses.
Ib. s. 225.

275. Any of the parties to any suit or appeal or to any proceedings before a warden or warden and assessors or to the trial of any issue or question of fact or to any examination under the provisions hereinbefore contained for the examination of debtors summoned for examination may obtain at the office of the clerk

of the court or of the warden as the case may be summonses to witnesses, to be served at the option of such party either by himself or his agent or by the bailiff of the court, with or without a clause requiring the production of books deeds papers and writings in their possession or under their control.

276. All affidavits to be used in any Court of Mines or before a judge thereof or in any proceeding before a warden shall and may be sworn before any judge of the Supreme Court, or any commissioner for taking affidavits in that court, or before the judge of any County Court or of any Court of Mines, or any warden or justice of the peace. [cf. 37 Vic. No. 13 (N.S.W.), sec. 118 ; 62 Vic. No. 24 (Q.), sec. 162 ; 59 Vic. No. 40 (W.A.), sec. 60 ; 62 Vic. No. 38 (N.Z.), sec. 295].

Who may take affidavits.
Ib. s. 226.

277. It shall be lawful for any party to any suit or appeal or to any proceeding before a warden or warden and assessors or to the trial of any issue or question of fact in any Court of Mines or to any such examination as aforesaid, or for an attorney of the Supreme Court being an attorney acting generally in the matter for such party but not an attorney retained as an advocate by such first-mentioned attorney, or for a barrister retained by or on behalf of such party on either side, to address the court and examine and cross-examine the witnesses ; and generally in any proceeding in a Court of Mines or before a warden the parties thereto may be respectively represented by any such attorney or barrister, but subject to such regulations as the judge may from time to time prescribe for the orderly transaction of the business of the court ; and in every proceeding before a warden the party who begins shall have the right to reply.

Appearance in person or by attorney.
Ib. s. 227.

278. The fees to be allowed to barristers-at-law and attorneys practising in any Court of Mines or before a warden for appearing or acting on behalf of any other person in any suit appeal or other proceeding in such court or in any proceeding before a warden, and to accountants engineers surveyors and other scientific persons whose assistance shall be obtained in any such suit appeal or proceeding, and the expenses to be paid to witnesses, shall be fixed by some scale in the general rules to be made as hereinafter mentioned ; and such fees and expenses shall together with the court fees or fees in proceedings before a warden be deemed costs

Fees to counsel and attorneys &c.
Ib. s. 228.

"Mining Statute 1865." in the suit appeal or other proceedings unless the court or judge or the warden shall otherwise order.

Clients may procure taxation of bills and counsel's fees.
Ib. s. 229.

279. It shall be lawful for the judge of any Court of Mines upon the application of any person who shall have employed any attorney or barrister in any suit appeal or other proceeding in such court or before such judge, or for a warden upon the application of any person who shall have employed any attorney or barrister in any proceeding before him or before him and assessors, to issue a summons requiring any attorney or any barrister (who in the opinion of such judge or warden shall not have been *bonâ fide* instructed by an attorney) to appear before such judge or warden at a time and place named in such summons; and at such time and place upon the appearance of such attorney or barrister or upon proof of due service of such summons such judge or warden shall proceed to tax the charges and fees of such attorney or barrister for any such proceedings in such court or before such judge or warden; and if in the opinion of such judge or warden the charges or fees of such attorney or barrister are unreasonable, it shall be lawful for such judge or warden, notwithstanding any contract between the parties, by order under his hand to direct such attorney or barrister to repay any part of such charges or fees; and such order if made by a judge may be filed with the clerk of any court holden under this Part of this Act within the district to which such judge shall belong; and the same and also any such order made by a warden may be enforced in the same manner as any decree of the court or order of the warden for payment of money. [cf. 59 Vic. No. 40 (W.A.), sec. 81].

Allowance and taxation of costs.
Ib. s. 230.

280. It shall be lawful for the judge in cases of suits and all other proceedings before the court of which he shall be judge or before himself, or for the warden in all proceedings before him or him and assessors, in his discretion to give or refuse to either party the costs of the suit hearing rehearing appeal or other proceeding before such court judge or warden or any part thereof; and in case of giving them, to give them in his discretion as between party and party, or as between solicitor and client, and in order to abolish the expense and delay occasioned by the taxation of costs after the hearing, the judge shall, either at the hearing or rehearing of any such suit appeal or other proceeding or at the time of pronouncing his decision or of making any order

under this Part of this Act, and the warden shall, at the time when the decision of him or of him and assessors shall be pronounced or any order made by him under this Part, tax the costs of such suit hearing rehearing appeal or proceedings to be paid by the plaintiff or defendant; and the amount of costs to be paid by either or any of the parties shall form part of the decree or order of the court or judge or warden; and in default of any special direction each party shall pay his own costs. [cf. 59 Vic. No. 40 (W.A.), sec. 81].

281. Whenever any suit or other proceeding is brought before a warden or in a Court of Mines or before a judge of such court which such warden court or judge has no jurisdiction to try, such suit or other proceeding shall be dismissed, and such warden court or judge shall have power to award costs in the same manner and to the same extent and such costs shall be recoverable in the same manner as if such warden court or judge had jurisdiction in the matter of such suit or other proceeding and the plaintiff had not appeared or had appeared and failed to prove his case.

Warden or court may award costs when suit struck out for want of jurisdiction.

Act No. 446, s. 17.

282. If any person shall wilfully insult the judge or any warden or any assessor or any clerk bailiff or officer of any court holden under this Act during his sittings or attendance in court or before such warden, or shall wilfully interrupt the proceedings of any such court or before any warden, or being summoned or examined as a witness in any suit appeal or proceeding in any such court or before a warden shall refuse to be sworn or to answer any lawful question, or shall in the opinion of the judge of the said court or of such warden be guilty of wilful prevarication, or if any person shall in any way misbehave in court or before a warden during his sitting as such warden or be guilty of any contempt whatsoever of any such court, it shall be lawful for the judge or warden (if he shall think fit) to commit any such offender to prison for any time not exceeding two months, or to impose on any such offender a fine not exceeding ten pounds for every such offence, and in default of immediate payment thereof to commit the offender as aforesaid for any time not exceeding two months unless the fine be sooner paid; and in either of the cases aforesaid a warrant in the form contained in the Thirty-second Schedule to this Act shall and may be issued by such judge or warden, and shall be good and valid in law without any

Contempt of court.

"Mining Statute 1865," s. 231.

Thirty-second Schedule.

"Mining Statute 1865." other order summons or adjudication whatsoever ; and the bailiff

and gaoler to whom the same shall be addressed shall obey the same. [cf. 37 Vic. No. 13 (N.S.W.), sec. 119 ; 62 Vic. No. 38 (N.Z.), sec. 276 ; 62 Vic. No. 24 (Q.), sec. 116 ; 56 & 57 Vic. No. 587 (S.A.), sec. 122].

Interpleader.
Ib. s. 232.

283. If any claim shall be made to or in respect of any goods or chattels taken in execution under any process issued out of any Court of Mines or by a warden or in respect of the proceeds or value thereof by any person not being the party against whom such process shall have issued, it shall be lawful for the clerk of such court or for such warden upon application of the officer charged with the execution of such process as well before as after any action brought against such officer to issue a summons calling before the said court or such warden as well the party issuing such process as the party making such claim ; and thereupon any action which shall have been brought in the Supreme Court or in any County Court in respect of such claim shall be stayed ; and the court in which such action shall have been brought or any judge thereof, on proof of the issue of such summons and that the goods and chattels were so taken in execution, may order the party bringing such action to pay the costs of all proceedings had upon such action after the service upon him of such summons issued out of the Court of Mines or by the warden ; and such last-mentioned court or the warden shall adjudicate upon such claim and make such order between the parties in respect thereof and of the costs of the proceedings as to it or him shall seem fit ; and such order may be enforced in like manner as any order made in any suit brought in such court or on any proceedings before such warden as the case may be. [cf. 37 Vic. No. 13 (N.S.W.), sec. 120 ; 62 Vic. No. 24 (Q.), sec. 135 ; 59 Vic. No. 40 (W.A.), sec. 78].

Computation of
time.
Act No. 446. s. 28.

284. In all cases in which any particular number of days not expressed to be clear days is prescribed by this Part of this Act the computation of time shall be exclusive of the first and inclusive of the last day, unless the last day shall fall upon a Sunday or holiday in which case it shall be exclusive of that also.

Power to make
rules of practice.
"Mining Statute 1865," s. 233.

285. It shall be lawful for the Chief Justice of the Supreme Court and any two or more of the judges of the Courts of Mines from time to time, but subject to this Part of this Act, to frame

such general rules as to them shall seem expedient for and concerning and so far as not herein provided for the pleadings practice and proceedings of the courts holden under this Part either in their original or appellate jurisdiction, and the practice and proceedings in cases before the wardens, and for the execution of the process of such courts and issued by such wardens and in relation to any of the provisions of this Part which relate to the courts to be holden thereunder and to proceedings before wardens and as to which there may arise any doubts; and also to frame forms for every matter or proceeding in the said courts or before such wardens for which they shall think it necessary that a form should be provided and not in this Part already provided for; and for and concerning the fees to be paid to barristers-at-law and attorneys practising in the said courts and before wardens and the expenses to be paid to witnesses in the said courts and before wardens; and from time to time to rescind or alter any such rule or form; and the rules and forms so framed shall be observed and used in all the said courts or in proceedings before the wardens as the case may be; and in any case not expressly provided for herein or by the said rules the general principles of practice in the Supreme Court may be adopted and applied at the discretion of the judge of any Court of Mines to suits and proceedings in his court and of the warden to proceedings before him; and all such rules as aforesaid shall from and after the expiration of the time fixed therein for the commencement thereof be of the same force and effect as if the same had been enacted by the Legislature. [cf. 37 Vic. No. 13 (N.S.W.), sec. 113; 62 Vic. No. 38 (N.Z.), sec. 278; 62 Vic. No. 24 (Q.), sec. 113.]

286. Every Order in Council made for the purposes of this Division of this Part of this Act, and all general rules framed under the power hereinbefore contained, shall be published in the *Government Gazette*; and every such order and all such rules respectively shall be laid before both Houses of Parliament within fourteen days after the making thereof respectively if Parliament be sitting, and if Parliament be not sitting then within fourteen days after the then next meeting of Parliament. [cf. 37 Vic. No. 13 (N.S.W.), sec. 114.]

Orders in Council and rules to be laid before Parliament.
Ib. s. 234.

DIVISION 3.—PENALTIES.

287. Any person who shall cut or remove any live or dead timber or any earth from or who shall mine or employ any other

Penalty for unauthorized occupation.

"Mining Statute
1865," s. 235.

person to mine in or shall cut or construct any race drain dam or reservoir through or upon any Crown lands applied to any public use or purpose or *bonâ fide* used or excepted as mentioned in sections fifteen and seventeen of this Act without being authorized so to do as hereinbefore mentioned shall be liable to the penalties by law imposed for the unauthorized occupation of Crown lands. And any person not being the holder of a business licence issued under this Act or any Act repealed by this Act who shall carry on or follow any business on any goldfield, and any holder of a business licence who shall occupy for the purpose of residence and business or either any greater extent of land than he is hereby or by any Act repealed by this Act entitled to occupy, or (except so far as authorized by any such repealed Act) any land within one quarter of a mile of any town village or hamlet or of land situated in any township and previously sold or advertised or specified as about to be offered for sale, and any holder of a miner's right or business licence who shall occupy for the purpose of residence any greater extent of land than he is entitled to occupy under this or any such repealed Act, shall be liable on conviction to forfeit and pay for the first offence a penalty not exceeding Ten pounds, and for the second offence a penalty not exceeding Twenty pounds and not less than Ten pounds, and for the third or any subsequent offence a penalty not exceeding Fifty pounds nor less than Twenty pounds. Provided that no conviction shall take place for any second or subsequent offence committed within fourteen clear days from the previous conviction. [cf. 37 Vic. No. 13 (N.S.W.), secs. 123, 124 ; 56 & 57 Vic. No. 587 (S.A.), secs. 118, 119 ; 57 Vic. No. 24 (Tas.), sec. 176 ; 59 Vic. No. 40 (W.A.), secs. 90, 91 ; 62 Vic. No. 38 (N.Z.), sec. 304].

Penalty for
offences
connected with
elections.
Ib. s. 236.

288. If any person tendering his vote under this Part of this Act shall knowingly and wilfully make a false answer to any of the questions aforesaid or personate or attempt to personate any voter or attempt to vote more than once at the same election, or if any returning officer shall knowingly and wilfully make a false return of the number of votes for any candidate at any election under this Part, or if any returning officer or deputy returning officer shall wilfully falsify or fraudulently suppress any voting paper, such person or such returning officer or deputy returning

officer shall be guilty of a misdemeanor; and shall on conviction thereof before any competent court be sentenced to imprisonment either with or without hard labour at the discretion of the court for some period not exceeding twelve months.

289. Any person who shall infringe any lawful by-law of any mining board shall on conviction thereof before a competent court forfeit and pay for every such offence a penalty not exceeding Ten pounds: and every such penalty shall be recovered in a summary way before a justice being also a warden. [cf. 37 Vic. No. 13 (N.S.W.), sec. 126; 59 Vic. No. 40 (W.A.), sec. 99 (3)].

Penalty for
breach of by-
law.
Ib. s. 237.

290. If any warden appointed under this Act shall knowingly adjudicate in any matter in which he shall have any pecuniary interest, he shall be guilty of a misdemeanor; and shall on conviction before any competent court be liable to fine and imprisonment or both in the discretion of such court. [cf. 37 Vic. No. 13 (N.S.W.), sec. 127; 56 & 57 Vic. No. 587 (S.A.), sec. 124; 62 Vic. No. 24 (Q.), sec. 164; 59 Vic. No. 40 (W.A.), sec. 96].

Penalty on
warden acting if
interested.
Ib. s. 238.

291. Any officer appointed under this Part of this Act or employed in putting the same or any of the powers thereof into execution, or any clerk or assistant of such officer who shall wilfully and corruptly exact take or accept any fee sum or reward whatsoever other than and except such fees or sums as are or shall be appointed and allowed respectively as aforesaid for or on account of anything done or to be done by virtue of this Part or on any account whatsoever relative to putting this Part into execution, shall on conviction thereof before any competent court forfeit and pay any sum not exceeding Fifty pounds, and shall be for ever incapable of serving or being employed under this Part in any office of profit or emolument. [cf. 37 Vic. No. 13 (N.S.W.), sec. 128; 62 Vic. No. 24 (Q.), sec. 165; 59 Vic. No. 40 (W.A.), sec. 97].

Penalty for
extortion.
Ib. s. 239.

292. Any person who shall assault obstruct or resist any warden or any person duly authorized by any warden so to do in lawfully entering upon any claim or land or in performing any other act authorized hereby or any bailiff or other officer or any clerk or assistant of such bailiff or officer or any inspector or other person in the performance of his duty or in the exercise of his powers under this Part of this Act, or any person who after

Assault on
warden and
other offences.
Ib. s. 240.

"Mining Statute
1865."

being removed by any warden under the provisions of this Part from any claim or other place shall forcibly or clandestinely retake or retain or endeavour to retake or retain possession thereof or of any portion thereof or of any share therein, or who after any decision of a warden that any complainant is entitled to use for mining purposes or to divert any water (such decision not having been altered on rehearing or reversed on appeal) shall resist such complainant or his agents in such use or diversion, or who upon or in consequence of the decision of any warden or assessors against him shall assault or threaten to assault any person in whose favour such decision shall have been made, shall on conviction thereof before any two justices forfeit any sum not exceeding Fifty pounds; and in default of payment shall be liable to be imprisoned for any period not exceeding six months. [cf. 37 Vic. No. 13 (N.S.W.), sec. 129; 62 Vic. No. 24 (Q.), sec. 166; 56 & 57 Vic. No. 587 (S.A.), sec. 122; 57 Vic. No. 24 (Tas.), sec. 179; 59 Vic. No. 40 (W.A.), sec. 98; 62 Vic. No. 38 (N.Z.), sec. 317].

Penalty on witness neglecting to appear.

Ib. s. 241.

293. Any person on whom any summons issued out of any Court of Mines or by any warden requiring such person to appear as a witness in such court or before such warden shall have been served personally or in such other manner as shall be directed by the rules to be framed as aforesaid and to whom at the same time payment or tender of his expenses shall have been made on the scale hereinbefore mentioned, and who shall refuse or neglect without sufficient cause to appear according to the tenor of such summons, or who having so appeared shall refuse to be sworn or answer any lawful question, shall on conviction thereof before any two justices forfeit and pay any sum not exceeding Ten pounds; but no such conviction shall exempt such person from any action for disobeying such summons. [cf. 37 Vic. No. 13 (N.S.W.), sec. 130; 62 Vic. No. 24 (Q.), sec. 168; 59 Vic. No. 40 (W.A.), sec. 82; 62 Vic. No. 38 (N.Z.), sec. 264 (3)].

Penalty on clerk or bailiff holding other offices or acting as counsel &c.

Ib. s. 242.

294. Every person who being a clerk of any Court of Mines or the partner of such clerk or a person in the service or employment of any such clerk or of his partner shall accept the office of bailiff of such court, or who being a bailiff of such court or the partner of any such bailiff or a person in the service or employment of any such bailiff or of his partner shall accept the office of clerk in

the execution of this Part of this Act, and also every officer of any such court who shall be by himself or his partner in any way directly or indirectly concerned as counsel attorney or agent for any party in any proceeding in the said court, shall for every such offence on conviction thereof before a competent court forfeit and pay the sum of One hundred pounds with full costs of suit to any person who shall sue for the same by action at law.

295. Notwithstanding the recovery of any penalty under this Part of this Act, any person shall be entitled to enforce any civil remedy which he may have by reason of the act or default in respect of which the penalty shall have been recovered. [cf. 37 Vic. No. 13 (N.S.W.), sec. 121].

Recovery of penalty not to bar civil remedy.
Ib. s. 243.

296. No proceedings under this Part of this Act shall be removed or removable into the Supreme Court, save and except as hereinbefore provided. [cf. 37 Vic. No. 13 (N.S.W.), sec. 122].

Proceedings not to be removed into Supreme Court.
Ib. s. 244.

297. Any person who shall feel himself aggrieved by any conviction or order of any justice or justices under this Part of this Act may appeal from any such conviction or order to the next Court of General Sessions of the Peace which shall be held nearest to the place where such conviction or order shall have been given or made; and the execution of every such conviction or order so appealed from shall be suspended in case such person shall with two or more sufficient sureties immediately before such justice or justices enter into a bond or recognisance to Her Majesty in the sum of fifty pounds, which bond or recognisance respectively such justice or justices is and are hereby authorized and required to take; and such bond or recognisance shall be conditioned to prosecute such appeal with effect and to be forthcoming to abide the determination of the said Court of General Sessions and to pay such costs as the said court shall award on such occasion; and such Court of General Sessions is hereby authorized and required to hear and determine the matter of the said appeal; and the decision of such last-mentioned court shall be final to all intents and purposes. [cf. 37 Vic. No. 13 (N.S.W.), sec. 131].

Appeal to general sessions.
Ib. s. 245.

298. Notwithstanding anything hereinbefore contained, no person shall be entitled to institute proceedings in any court holden under this Part of this Act or in any other court or before

Incapacity to sue without miner's right.
Ib. s. 246.

any warden to recover possession of any land occupied by virtue of any miner's right issued under this Part or of any share in such land, or to recover any damages for or to restrain the occupation of or encroachment upon such land or any part thereof, or to obtain any relief as tenant in common joint tenant co-partner or co-adventurer in any such land against his tenant in common joint tenant co-partner or co-adventurer, unless such person shall have been the holder of a miner's right or included in a consolidated miner's right at the time when his alleged title to recover such possession or damages or to obtain such relief first arose or accrued. [cf. 37 Vic. No. 13 (N.S.W.), sec. 19; 62 Vic. No. 24 (Q.), sec. 160; 59 Vic. No. 40 (W.A.), sec. 17; 62 Vic. No. 38 (N.Z.), reg. 5; 56 & 57 Vic. No. 587 (S.A.), sec. 20 (vii)].

PART II.—MINING ON PRIVATE PROPERTY.

[Secs. 299-350 inclusive are repealed by No. 1514. See No. 1514, Part II, *post*].

PART III.—GENERAL PROVISIONS.

DIVISION 1.—REGULATION AND INSPECTION OF MINES AND MINING MACHINERY.

[Secs. 351-376 inclusive are repealed by No. 1514. See No. 1514, Part III, Division 1, *post*].

DIVISION 2.—DRAINAGE OF MINES (a).

377. In the construction of this Division of this Part of this Act the following words and expressions if not repugnant to the context shall have the respective meanings hereby assigned to them (that is to say):—

Interpretation.
"Crown land."

"Crown land" shall include all lands of the Crown :

"Machinery."

"Machinery" shall apply to and include all appliances including tunnels used or that may be used for the purpose of raising lifting or draining water whether worked by steam water horse or other power :

(a) Cf. 62 Vic. No. 24 (Q.), Part XII; 59 Vic. No. 40 (W.A.), Regs. April 15, 1896, cl. 147; 56 & 57 Vic. No. 587 (S.A.), Part V; 57 Vic. No. No. 24 (Tas.), Part VII.

“Mine” shall apply to and include all land or ground held used or occupied by any person for mining purposes : “Drainage of Mines Act 1877.”
“Mine.”

“Mining purposes” shall mean the purpose of obtaining gold or any metal or mineral other than gold by any mode or method and of stacking or otherwise storing any earth : “Mining purposes.”

“Owner of any machinery” shall include the mortgagee in possession, and shall also include any person or number of persons association company joint-stock company or corporation whether engaged in mining or in mining in conjunction with drainage or for the purpose of drainage only ; and “owner of any mine” shall apply only to any person using or occupying any land or ground for mining purposes and shall also include any person or number of persons association company joint-stock company or corporation using or occupying any land or ground, and whether Crown land or land the property of any private person, for “mining purposes” as the words “mining purposes” are defined in this section : “Owner of any machinery.”
“Mining Statute 1865,” s. 3.
“Owner of any mine.”
“The Drainage of Mines Amend. Act 1886,” s. 2.

“Warden” shall mean one of Her Majesty’s wardens of the goldfields in and for Victoria or in and for any district thereof. “Warden.”

378. [Repealed and re-enacted by No. 1514, sec. 157, *post*].

379. The expense of the drainage effected by the owner of any machinery shall be arrived at by calculating— Calculation of expense of drainage.

- (a) The interest on the value of machinery and plant used for drainage purposes only : “Drainage of Mines Act 1877,” s. 4.
- (b) The wear and tear of such machinery and plant :
- (c) The cost of oil grease and packing :
- (d) The proportionate cost of fuel expended or of horses employed in drainage operations :
- (e) The wages of engine-drivers and of other persons in such proportions as such persons may be deemed to be employed in draining a mine ; and
- (f) Such other expenses as the owner can prove that have necessarily been incurred in respect of the drainage

"*Drainage of
Mines Act 1877.*"

effected by any machinery. [cf. 57 Vic. No. 24
(Tas.), sec. 118].

No drainage
dues to be
demanded in
certain cases.
Ib. s. 5.

380. No drainage dues shall be demanded for any period during suspension of drainage operations; and in determining the cost of drainage effected by the owner of any machinery if the whole or any part of the water raised by such machinery shall be used by the owner of such machinery for mining purposes the value of such water shall be ascertained and deducted from the general cost of such drainage. [cf. 57 Vic. No. 24 (Tas.), sec. 119].

Mode of
calculating
amount of
contribution.
Ib. s. 6.

381. In determining the mines the owners of which shall be liable to contribute towards the expense of the drainage effected by the owner of any machinery regard shall be had to the total length of reef or lode or the extent of lead or auriferous deposit affected by the drainage operations of such machinery and to the amount of the benefit derived by the owners of mines from such operations, and the share to be contributed in respect of each mine drained shall be proportioned as nearly as may be to the length of such reef or lode or the extent of such auriferous lead or deposit contained within each such mine and to the amount of benefit so derived. [cf. 57 Vic. No. 24 (Tas.), sec. 120].

Work done
by owners.
Ib. s. 7.

382. The owners of each mine liable so to contribute shall receive credit for the value of any work they shall perform in assisting to drain, and such value shall be added to the general cost of drainage. [cf. 57 Vic. No. 24 (Tas.), sec. 121].

Form of
Warden's order.
"*The Drainage
of Mines
Amend Act
1886,*" s. 3.
Thirty-sixth
Schedule.
Not to be set
aside for want of
form.

383. Any order made by a warden in exercise of the jurisdiction or powers conferred by this Division of this Part of this Act shall be signed by the warden making the same, and may be either written or printed in the form or to the effect in the Thirty-sixth Schedule hereto, and shall be valid and effectual without any recital or statements necessary to show jurisdiction; and no order of a warden under this Division of this Part shall be set aside or declared invalid in any court whatsoever for want of form. [cf. 57 Vic. No. 24 (Tas.), sec. 122].

Filing and
enforcement
of warden's
order in Court
of Mines of
district.
Ib. s. 4.

384. Whenever any sum of money or portion of any sum of money ordered to be paid in or by any decision or order of a warden under this Division of this Part of this Act, and whether such money was ordered to be paid at one time or in periodical

payments, shall remain unsatisfied in whole or in part, and whether after previous executions or not, for fourteen days or for a longer period, the warden who shall have made such order or any other warden to whom a certified copy of the said order shall be produced shall on the application of the owner of machinery claiming to be entitled to the moneys in such order or any attorney in his behalf grant to the party so applying a certificate in the form in the Thirty-seventh Schedule to this Act or to the like effect; and it shall be lawful for the party obtaining such certificate or his attorney to file such certificate with the clerk of the Court of Mines of the district in which such order shall have been made, and thereupon execution may issue and all such proceedings be had and taken to enforce payment of the moneys mentioned in such order as upon a decree or order of the court to the clerk of which such certificate shall be directed. And in the event of any such decision or order of the warden imposing upon the owner of machinery any terms with regard to the efficient working of the machinery or otherwise, such terms may be enforced in the same manner as orders by a warden other than or besides orders for the payment of money may be enforced under Part I of this Act; and it shall be lawful for the warden to suspend the enforcement of so much of the order as directs the payment of money to the owner of machinery until the terms in such order imposed upon such owner of machinery have been carried out by him. [cf. 57 Vic. No. 24 (Tas.), sec. 122].

"The Drainage of Mines Amend. Act 1886."

Thirty-seventh Schedule.

385. Whenever and so soon as any order of a warden made under this Division of this Part of this Act shall have been filed with the clerk of the Court of Mines, the moneys directed in such order to be paid shall so long as any part thereof remains unpaid and unsatisfied become and be a charge subject to prior encumbrances upon the estate or interest of the owner of the mine in the Crown land or private lands occupied or used for mining purposes by the owner of the mine in respect of which the money mentioned in such order is directed to be paid and upon all plant and machinery thereon and all property of the owner of the mine in such land plant and machinery; and the warden by whom such order shall have been made or any other warden to whom a certified copy of such order shall be produced may by his order restrain the sale or other disposal or transfer of such interest in

Certified order to be a charge on property of mine owner.

Ib. s. 5.

Warden may restrain sale of such property until moneys paid.

"*The Drainage of Mines Amend. Act 1886.*"

the land plant machinery or property until such moneys have been paid ; but this provision shall not be deemed in any way to lessen the right of seizure and sale of such land plant machinery and property under any execution issued for the realization of the moneys ordered in such warden's order to be paid or contributed. [cf. 57 Vic. No. 24 (Tas.), sec. 123].

Remedies in this Division to be cumulative.

Ib. s. 6.

386. The remedies provided in the three last preceding sections shall be taken to be cumulative and ancillary to the remedies given in or by any other section in this Division of this Part of this Act and shall not be construed to in any way lessen or take away any of the jurisdiction power or remedies created or given in or by such lastmentioned sections. [cf. 57 Vic. No. 24 (Tas.), sec. 124].

DIVISION 3.—ACCIDENTS RELIEF FUND.

Preamble.

Whereas a large sum of money was raised by public subscription for the grant of certain benefits pensions and allowances to divers persons who were injured by an accident which occurred in the New Australasian Mining Company's mine at Creswick in the month of December in the year of our Lord One thousand eight hundred and eighty-two and for the grant of pensions and other allowances to the widows and orphan children of such persons as lost their lives by the said accident, and after the satisfaction of such pensions and other allowances then for the relief of sufferers from subsequent accidents in mines in Victoria : And whereas it was deemed expedient that trustees should be appointed and provision made for enforcing the conditions on which such moneys had been allotted and also for disposing of any surplus or other moneys which might be thereafter from time to time voted by Parliament or subscribed by the public and for relieving the sufferers by any accident which had occurred or might thereafter occur in any mine in Victoria : Be it therefore enacted as follows (that is to say) :—

Incorporation of trustees.

"*The Mining Accident Relief Fund Act 1884,*"
s. 2.

387. The Minister of Mines the Speaker of the Legislative Assembly the Mayor of the city of Melbourne the Mayor of the city of Ballarat the Mayor of the city of Sandhurst and the Mayor of the town of Ballarat East and the Mayor of the borough of Creswick and the President of the Miners' Association for the time being respectively shall be and shall be deemed to have been from the

passing of the Act No. 826 a body corporate by the name of "The Victorian Mining Accident Relief Trustees" (hereinafter referred to as the "trustees"), and shall by that name have and be deemed to have had from the time aforesaid perpetual succession and a common seal and shall be and shall be deemed to have been from the time aforesaid capable in law of suing and of being sued, and shall subject to the provisions of the said Act and of this Division of this Part of this Act have and be deemed to have had from the time aforesaid power to purchase take and hold lands tenements and hereditaments for the purpose of any mortgage or for the purpose of providing offices for the conduct of their business and to sell and convey any such lands tenements and hereditaments.

388. Anything by this Division of this Part of this Act authorized to be done by the trustees may be done by any three of such trustees at any meeting of the trustees duly convened by the Mayor of Melbourne on the requisition of any two trustees by a notice addressed to the public office of each trustee and posted four days before such meeting. The Mayor of Melbourne shall be chairman of the trustees and shall if present preside at their meetings, and if he be not present at any such meeting then such other trustee as the trustees present at such meeting shall choose shall preside thereat. The trustee presiding at any meeting of the trustees shall in the event of an equal division of votes at such meeting have a second or casting vote. The trustees may from time to time appoint a secretary and such other officers and employés as they think fit and may remove any persons so appointed, and they may pay such secretary officers and employés such salaries and remuneration as they think fit.

Quorum and
appointment of
officers.
Ib. s. 3.

389. All moneys raised by public subscription for the relief of the sufferers by the accident which occurred in the New Australasian mine at Creswick in the month of December in the year of our Lord One thousand eight hundred and eighty-two and forming the Victorian Mining Accident Relief Fund, and which at the time of the passing of the Act No. 826 remained unexpended and were under the control of "The Creswick Mining Disaster Relief Fund Executive Committee," consisting of James Dodgshun, Robert Glover Benson, Emanuel Steinfeld, William Mountford Kinsey Vale, Ephraim Lamén Zox, and Edmund Gerald

Moneys vested
in trustees.
Ib. s. 4.

“The Mining Accident Relief Fund Act 1884.” FitzGibbon, are hereby declared to be and to have been from the passing of the said Act vested in the trustees.

“The Victorian Mining Accident Relief Fund.”
Ib. s. 5.

390. All moneys vested in the trustees by the Act No. 826 or by this Division of this Part of this Act shall form subject to the provisions herein contained a permanent and indefeasible fund under the name of “The Victorian Mining Accident Relief Fund” hereinafter referred to as the “Fund.”

All subscriptions donations grants and bequests to the Fund and all other moneys whatsoever heretofore or from time to time hereafter received by the trustees in virtue of their office as such trustees shall be deemed from the date of their receipt to have formed and shall form respectively part of the Fund, and all such subscriptions donations grants and bequests unless specially directed by the donors thereof to be otherwise applied shall be deemed to have formed and shall form respectively part of the capital moneys of the Fund.

Investment of Fund.
Ib. s. 6.

391. All moneys forming part of the Fund may be invested in Victorian Government Debentures Victorian Government Inscribed Stock or Victorian Government Stock or may be placed on deposit in any bank incorporated by Act of Parliament or Royal Charter or registered as a trading company in amounts not exceeding Five thousand pounds in any one bank, or may be lent on first mortgages of freehold lands tenements and hereditaments in the city of Melbourne or its suburbs.

Restriction on alienation of capital moneys of Fund.
Ib. s. 7.

392. In addition to such moneys as the trustees may from time to time receive and which do not under the provisions of this Division of this Part of this Act form part of the capital moneys of the fund only the interest arising from such capital moneys of the Fund shall (subject to the provisions hereinafter contained) be appropriated in making payments for the purpose of carrying out the objects of this Division of this Part of this Act.

Application of income.
Ib. s. 8.

393. The income derived from the investment of the fund shall be applied first in defraying all proper and reasonable costs charges and expenses of controlling and managing the fund and carrying this Division of this Part of this Act into effect, and then in making payments to the persons named in and in accordance with the provisions of the Schedule of Act No. 826. Any income remaining thereafter in any year and any moneys specially

directed by the donors thereof to be so applied shall be used by the trustees in assisting persons who may be injured by any other mining accident in Victoria and permanently disabled from supporting themselves or may be applied in assisting the relations of persons who may be killed or injured by any such accident.

"The Mining Accident Relief Fund Act 1884."

In event of the income as aforesaid not being sufficient after paying costs charges and expenses as aforesaid for making payments in accordance with the provisions of the said Schedule then (but for that purpose only) the trustees may from time to time apply such portion of the capital moneys of the fund as may appear necessary to make such payment in accordance with such provisions.

If after all payments authorized by this Division of this Part of this Act and directed by the trustees have been made in any year ending the thirty-first day of December, any moneys of the fund not forming part of the capital moneys thereof remain unexpended, such moneys shall be deemed to form part of such capital moneys.

394. The accounts of the trustees for the year ending on the thirty-first day of December shall in each and every year be audited in such manner as may from time to time be directed by the Governor in Council, and the Governor in Council may appoint any person or persons to be auditors of such accounts and may remove any such person or persons. Every such person or persons shall be paid such fees for auditing such accounts as the Governor in Council directs, and such fees shall be deemed to form a portion of the costs charges and expenses of controlling and managing the fund.

*Audit of accounts.
Ib. s. 9.*

395. The trustees shall in each and every year so soon as the yearly audit of their accounts is complete cause to be prepared a statement under their common seal of moneys received and moneys expended by them, and shall forward the same to the Governor in Council with a request that he will cause the same to be laid before both Houses of Parliament.

*Statement of receipts and expenditure to be laid before Parliament.
Ib. s. 10.*

396. If any person named in the Schedule to the said Act No. 826 has become or becomes whilst entitled to any payment from the fund possessed of any means of support from any other source, the trustees shall reduce the amount of such payments or may

*Persons named in Schedule becoming possessed of means of support.
Ib. s. 11.*

*"The Mining
Accident Relief
Fund Act 1884."*

cease to make any such payments to such person ; and if such person be a person described in the said Schedule as a widow, then the children of such widow shall be deemed to be persons who have become possessed of such means of support. The trustees may notwithstanding that they have previously reduced the amount of or ceased to make any such payments as aforesaid to any person increase the amount of such payment to the amount which would be payable under the provisions of the said Schedule or to any smaller amount, or may where any such payments have been wholly discontinued by them again make such payments as may be authorized by the provisions of the said Schedule. If any person named in the said Schedule be in the receipt of relief from or become an inmate of any charitable institution (except on account of temporary illness or temporary bodily infirmity), such person shall cease to be entitled to receive any payments from the fund. If any person named in the said Schedule dispose of transfer or assign his or her interest in any moneys coming to him from the fund, all payments therefrom to or on behalf of such person shall thereupon cease.

Misappropriation of moneys.
Ib. s. 12.

397. Every agreement made by any trustees or officers to pay any money out of the fund except as herein provided shall be null and void, and any trustee or other officer making such agreement or paying any moneys out of the fund contrary to the provisions of this Division of this Part of this Act shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding seven years.

Liability of trustee or officer.
Ib. s. 13.

398. No trustee or officer shall as such be under personal liability to any creditor beyond the property (if any) of the trust in his hand.

Power to make rules and regulations.
Ib. s. 14.

399. The trustees shall have power from time to time subject to the approval of the Governor in Council to make alter and repeal rules and regulations not inconsistent with the provisions of this Division of this Part of this Act for regulating their proceedings and the conduct of their business, for regulating the duties of their officers and employes, and for taking security for the due and faithful performance of their duty by such officers and employes, for prescribing the conditions upon which relief shall

be given from the fund, and for regulating generally such relief, *“The Mining Accident Relief Fund Act 1884.”* and generally for carrying out the provisions of this Division of this Part of this Act.

All such rules and regulations and all such amendments and repeals thereof shall not be of any force or effect until the same have been notified by publication in the *Government Gazette*.

SCHEDULES.

FIRST SCHEDULE.

Section 2.

Date of Act.	Title of Act.	Extent of Repeal.
29 Vict. No. 291	“ <i>Mining Statute 1865</i> ”	So much as is not already repealed.
31 Vict. No. 316	“ <i>An Act to amend the ‘Mining Statute 1865’</i> ”	The whole.
33 Vict. No. 354	“ <i>An Act to amend the ‘Mining Companies Limited Liability Act 1864’ and for other purposes</i> ”	So much as is not already repealed.
34 Vict. No. 372	“ <i>An Act to amend the ‘Mining Companies Limited Liability Act 1864’ and for other purposes</i> ”	So much as is not already repealed.
36 Vict. No. 446	“ <i>An Act to amend the ‘Mining Statute 1865’</i> ”	So much as is not already repealed.
41 Vict. No. 596	“ <i>Drainage of Mines Act 1877</i> ” ...	The whole.
45 Vict. No. 709	“ <i>The Residence Areas Act 1881</i> ”	So much as is not already repealed.
47 Vict. No. 783	“ <i>The Regulation of Mines and Mining Machinery Act 1883</i> ”	The whole.
48 Vict. No. 796	“ <i>The Mining on Private Property Act 1884</i> ”	So much as is not already repealed.
48 Vict. No. 801	“ <i>The Residence Areas Act 1884</i> ”	The whole.
48 Vict. No. 826	“ <i>The Mining Accident Relief Fund Act 1884</i> ”	The whole except the Schedule.
49 Vict. No. 861	“ <i>The Mining Act 1885</i> ”	So much as is not already repealed.
50 Vict. No. 883	“ <i>The Regulation of Mines and Mining Machinery Act 1886</i> ”	The whole.
50 Vict. No. 890	“ <i>An Act to amend the Law relating to the Qualification of Persons entitled to Vote at Elections of Members of Mining Boards</i> ”	The whole.
50 Vict. No. 908	“ <i>The Drainage of Mines Amendment Act 1886</i> ”	The whole.
51 Vict. No. 924	“ <i>The Mining Rents Act 1887</i> ” ...	The whole.
51 Vict. No. 926	“ <i>The Regulation of Mines and Mining Machinery Act 1887</i> ”	The whole.
52 Vict. No. 993	“ <i>The Residence Areas Act 1888</i> ”	The whole.
52 Vict. No. 998	“ <i>The Mining on Private Property Amendment Act 1888</i> ”	The whole.

Sections 4 & 14.

SECOND SCHEDULE.

FIRST PART.

MINER'S RIGHT.	VICTORIA.
—	No.
No.	[Insert here sum paid for the Miner's Right.]
District and Place in which issued	District and Place in which issued
Date	Date
Name	MINER'S RIGHT.
To be in force until	Issued to of under the provisions of the <i>Mines Act</i> 1890 No. to be in force until 18

SECOND PART.

CONSOLIDATED MINER'S RIGHT.	VICTORIA.
—	No.
No.	[Insert here sum paid for the Miner's Right.]
District and Place in which issued	District and Place in which issued
Date	Date
Name of the person to whom issued	CONSOLIDATED MINER'S RIGHT.
To be in force until the day of	Issued to of the manager [or trustee] of the Company under the provisions of the <i>Mines Act</i> 1890 No. to be in force until the day of 18 , and to represent Miners' Rights.

Sections 11 & 14.

THIRD SCHEDULE.

BUSINESS LICENCE.	VICTORIA.
—	No. 99.
No. 99.	[Insert sum paid for the Business Licence.]
£	District and Place in which issued
Date	Date
Name	[Insert here whether for six or twelve months.]
To be in force until the day of 18 .	BUSINESS LICENCE.
	Issued to of under the provisions of the <i>Mines Act</i> 1890 to be in force until the day of 18 .

Section 22.

FOURTH SCHEDULE.

In the Court of Mines in the Mining District of

Upon [the application of the Board of Land and Works or] reading the business licence [or miner's right] of A.B. I do order that the building or erection occupied by [A.B. or] him under the said licence [or right] at

FOURTH SCHEDULE—*continued.*

in the said district shall be valued by E.F. of &c. and two other persons to be appointed according to law and their award shall be made on or before the day of

Given under my hand and the seal of the said court this day of J.H. (L.S.)

FIFTH SCHEDULE.

Section 22.

We A.B. of &c. C.D. of &c. and E.F. of &c. have valued the building or erection on land occupied by A.B. under a miner's right [or business licence] and situate at in the Mining District of at the sum of

In witness whereof we have hereunto set our hands the day of A.B. C.D. E.F.

SIXTH SCHEDULE.

Section 92.

Mining District of Division of Candidates' names. A.B. C.D. &c. &c.

The voter is to strike out the name or names of the candidate or candidates for whom he does not intend to vote by drawing a line through the same with a pen or pencil.

He must be careful not to leave uncanceled the names of more than candidates otherwise his ballot-paper will be invalid.

The ballot-paper so marked by or for the voter is to be dropped by him into the ballot-box.

The voter is not to be permitted to take his ballot-paper out of the polling-room.

SEVENTH SCHEDULE.

Section 107.

At a meeting of the Mining Board of the Mining District of begun and holden at in the said district on the day of it is ordained by the said board as follows (that is to say).

- I. Every claim &c.
- II. No miner &c.

EIGHTH SCHEDULE.

Section 108.

MINING BY-LAW.—Notice is hereby given that I dispute the validity [or propriety] of a by-law made by the Mining Board of the Mining District of and dated the day of and numbered

My reasons for disputing the validity [or propriety] of the said by-law are as follows (that is to say) :—[Here specify the objections.]

I further give notice that at the expiration of twenty-one days from this date I shall apply to the Law Officers in order that such by-law may be revoked by the Governor with the advice of the Executive Council within

EIGHTH SCHEDULE—*continued.*

which period all persons objecting to such revocation must send their objections in writing to the Law Officers at their office in Melbourne otherwise they cannot be received.

Dated the day of

—————

Section 140.

NINTH SCHEDULE.

To be prosecuted with [*or without as the case may be*] written pleadings.

PLAINT No.

In the Court of Mines of the Mining District of

On the day of 18

A. B. of [*if more than one plaintiff mention them all with their places of abode so far as known as directed by the Act but if numerous some may sue on behalf of all in the cases provided for by the Act*] the plaintiff by C. D. his attorney [*or in person*] sues E. F. of [*if more than one defendant mention them all with their places of abode so far as known as directed by the Act but if numerous some may be sued on behalf of all in the cases provided for by the Act*] and says—

1. That &c.
2. That &c.

[*Set forth the subject-matter of the plaintiff's case in paragraphs as directed by the Act and then conclude as follows :—*]

The plaintiff therefore prays [*setting forth the relief sought*] or such other or further relief as shall be just.

NOTE.—The amount sought to be recovered so far as the demand is pecuniary is pounds.

—————

Section 143.

TENTH SCHEDULE.

PLAINT No.

To [*names of defendants*]
of

You (and each of you) are hereby summoned to appear at the Court of Mines at on the day of next at ten o'clock in the forenoon of the same day precisely to answer the within plaint of the person [*or persons*] named in the said plaint as plaintiff [*or plaintiffs*].

If you neglect to appear then upon proof of the due service upon you of a copy of this summons the suit when called for hearing will be heard and such decree made against you as may appear to be just.

You may pay into court the sum of in full satisfaction of the demand of the plaintiff so far as the same is pecuniary together with the costs incurred in this matter so far as relates to that sum clear days before the time at which you are hereby required to appear and by so doing you will avoid any further expense in respect thereof.

You may have a summons to compel the attendance of any witness or for the production of any books or documents on applying at my office.

Bring this summons with you when you come to the court or to my office.

TENTH SCHEDULE—*continued.*

Given under my hand and the seal of the said court this day
of 18 .

(L.S.) Clerk (or Assistant Clerk) of the said court at
[*Insert place at which the office from which the summons issues is situated.*]
The plaintiff proceeds in person [or by Mr. his "attorney"].

NOTE.—*The blank left in this and in the next form for the time for payment into court of the sum claimed must be filled up with reference to the time fixed for such payment by the general rules.*

ELEVENTH SCHEDULE.

Section 143.

PLAINT No.

To [*names of the defendants*].

You (and each of you) are hereby required within days after service hereof upon you exclusive of the day of service to deliver an answer to the within plaint of the plaintiff.

You may pay into court the sum of in full satisfaction of the demand of the plaintiff so far as the same is pecuniary together with the costs incurred in this matter so far as relates to that sum clear days before the time at which you are hereby required to deliver your answer and by so doing you will avoid any further expense in respect thereof.

Given under my hand and the seal of the Court of Mines of the Mining District of this day of 18 .

(L.S.) A.B. Clerk (or Assistant Clerk) of the said court at
[*Insert place at which the office from which the summons issues is situated.*]
The plaintiff proceeds in person [or by C.D. his "attorney"].

TWELFTH SCHEDULE.

Section 150.

PLAINT No.

In the Court of Mines of the Mining District of

[*Names of plaintiffs and defendants.*]

The day of 18

The objection of A.B. defendant [or one of the defendants] to the plaint of the above-named plaintiff [or plaintiffs].

This defendant objects that the plaintiff [or plaintiffs] by his [or their] own showing is [or are] not entitled to the relief sought by the said plaint. For that [*set forth the ground of objection commencing if more than one every subsequent one after the first with the words "and also for that" and in a separate paragraph.*]

A.B. the above-named defendant in person
[or C.D. attorney] for A.B. the above-named defendant.

Section 151.

THIRTEENTH SCHEDULE.

PLAINT No.

In the Court of Mines of the Mining District of

[Names of plaintiffs and defendants.]

The day of 18 .

The answer of A. B. defendant [or one of the defendants] to the plaint of the above plaintiff [or plaintiffs].

This defendant for answer saith—

1. He denies &c.
2. He admits &c.

A. B. the above-named defendant in person [or C. D. attorney] for A. B. the above-named defendant.

Section 154.

FOURTEENTH SCHEDULE.

No.

In the

Between A. B. plaintiff

and

C. D. defendant.

Take notice that the proposes to prove the several facts and documents hereunder specified and that such documents may be inspected by the plaintiff [or defendant] his attorney [or solicitor] or agent at on Monday next between the hours of and o'clock and that the plaintiff [or defendant] is hereby required within forty-eight hours from the last-mentioned hour to admit the said several facts and that such of the said documents as are specified to be originals were respectively written signed or executed as they purport respectively to have been that such as are specified to be copies are respectively true copies and such copies as are stated to have been served sent or delivered were so served sent or delivered respectively saving all just exceptions to the admissibility of all such facts and documents as evidence in this cause.

Dated this day of 18 .

G. H.,

Attorney or Agent for &c.

To Mr.

the Attorney or Agent.

ORIGINALS.

Description of Documents.	Date.
1. An agreement signed by the plaintiff and John Doe	1st January 1860.
2. A letter from the defendant to the plaintiff	1st February 1860.

FOURTEENTH SCHEDULE—continued.

COPIES.

Description of Documents.	Date.	Original or Duplicate served sent or delivered when how or by whom.
1. Letter from the plaintiff to defendant.	1st January 1860.	Sent by post on the same day.

FACTS.

1. That the above-named John Doe was authorized by the defendant to sign the above-mentioned agreement on his behalf.
2. That John Jones died on the 1st day of March 18 intestate.
3. That John Smith was at the commencement of this suit the heir-at-law of the said John Jones.

Section 154.

FIFTEENTH SCHEDULE.

I hereby admit the originals numbered 1 the copies numbered 1 and the facts numbered 2.

A.B.,
Defendant's Agent.

Sections 183, 242,
and 252.

SIXTEENTH SCHEDULE.

FIRST PART.

PLAINT No. .

To the Bailiff of the Court of Mines of the Mining District of

These are to command you to seize and take the lands tenements and hereditaments goods chattels personal money bank notes cheques bills of exchange promissory notes bonds specialties or security for money belonging to O.B. (except the wearing apparel and bedding of himself or his family and the implements of his trade to the value of ten pounds which are to that extent protected from such seizure) and if within the space of twenty-four hours next after such seizure the said O.B. shall not pay to you the sum of which A.T. lately in the said Court *[or if the warrant be issued by a warden "before C.D. a warden" or "C.D. a warden and assessors"]* recovered against him and also for this warrant together with the costs and charges of the said seizure and of keeping possession you must retain the said money and bank notes for the purpose of satisfying the said several sums and the said costs and charges but if the said several sums costs and charges shall not thereby be satisfied you must forthwith sell the said goods and chattels (except as aforesaid) for the purpose of levying and raising the same together with the expenses of such sale and if the said sums costs charges and expenses shall not be thereby levied and raised you shall hold the said cheques bills of exchange promissory notes bonds specialties and securities as a security or securities for the said sums costs charges and expenses or so much thereof as shall not have been otherwise levied or raised for the benefit of the said A.T.

EIGHTEENTH SCHEDULE—*continued.*

amounting to And whereas the said sum and costs have not been paid into the said court according to the said order.

These are therefore to command you the said bailiff to take the said O.B. and convey him to the said gaol and deliver him to the said keeper thereof and you the said keeper are hereby required to receive him into your custody in the said gaol and him there safely to keep until you shall receive a certificate signed by the clerk of the said court and sealed with the seal thereof that the said O.B. has paid or satisfied the said sum and costs together with all subsequent costs or until the said O.B. shall be otherwise discharged by due course of law.

Given under my hand and the seal of the said court this day of

(L.S.) JOHN DOE,
Clerk of the said Court.

NINETEENTH SCHEDULE.

Sections 192 and 249.

PLAINT No.

In the Court of Mines of the Mining District of [*The title to be omitted if the summons be issued by a warden.*]

To A.B.

Whereas the said court [*or C.D. Esquire the judge of the said court or E.F. Esquire a warden*] did on the day of make a decree [*or order*] that [*state the thing decreed or ordered to be done and in what respects the decree or order has been disobeyed*] and you a person named in such decree [*or order*] and intended to be bound thereby have disobeyed the same and the same now remains disobeyed.

These are therefore to require you to appear personally before the said court [*or before the Court of Mines of the Mining District of* [*or before G.H. Esquire Judge of the Court of Mines of the Mining District of* or before the said warden or any other warden] at on the day of at o'clock in the noon to show cause why you should not be committed to prison for disobedience of such decree [*or order.*]

Given under my hand and the seal of the said court this day of

(L.S.) O.P.,
Clerk of the said Court.

[*or if issued by a warden*] Given under my hand this day of
E.F., Warden.

TWENTIETH SCHEDULE.

Section 192.

PLAINT No.

To the Bailiff of the Court of Mines of the Mining District of and to the Keeper of the Gaol at

These are to command you the said bailiff to take O.B. and to convey him to the said gaol and to deliver him to the said keeper thereof and you the said keeper are hereby required to receive the said O.B. into your custody in the said gaol and him there safely to keep until the Judge of the said Court of Mines shall otherwise order or until the said O.B. shall be otherwise discharged in due course of law.

TWENTY-THIRD SCHEDULE—*continued.*

or upon a certain mining partnership account or for wages or for calls or fines or state generally nature of claim]. If you desire to have the said complaint heard before assessors you are entitled to have it so heard.

You may have a summons to compel the attendance of any witness or for the production of any books or documents on applying at my office.

Bring this summons with you when you come to my office.

Given under my hand this _____ day of _____ 18 .
Warden.

TWENTY-FOURTH SCHEDULE.

Section 223.

No. of Complaint.	Date of Complaint.		Complainant.		Defendant.		Nature of Relief sought.	Amount of Demand pecuniary.	Decision and stating whether heard before Assessors or not.	Date when the Name of Person to whom Certificate of Decision given.	Date of Injunction or of other order not in a Suit.	Memorandum.	Date of Notice of Appeal (if any) received by Warden.	General Remarks and Observations by Warden.
	Name.	Address.	Name.	Address.										

TWENTY-FIFTH SCHEDULE.

Section 232.

I A.B. do swear well and truly to try and determine the matters which shall be brought before me and a true judgment to give according to the evidence without fear or favour.

So help me God.

TWENTY-SIXTH SCHEDULE.

Section 232.

I A.B. do solemnly sincerely and truly affirm and declare that the taking of an oath is according to my religious belief unlawful and I do also solemnly sincerely and truly affirm and declare that I will well and truly try &c.

Sections 235 and
243.

TWENTY-SEVENTH SCHEDULE.

A. B. and C. D. Complainants, E. F. and G. H. Defendants.

I find [if upon the verdict of assessors insert "upon the verdict of assessors"] that [set forth the decision] and I order [state the warden's order in full as for instance "that possession of the land [describing it or] 'described in the schedule to this order'] be delivered to A. B. and C. D." and that the said E. F. and G. H. do pay to the said A. B. and C. D. the sum of pounds for damages and pounds for costs.

I also order that certain auriferous earth in the possession of the said A. B. and which has been valued by me [or by the said assessors] at shall be delivered to the said A. B. and C. D. in satisfaction [or in part satisfaction] of such damages and costs.

Dated this day of

(Signed)

J. K., Warden.

NOTE.—The statements in this form are by way of example only.—The form must be filled up according to the nature of the case.

Section 248.

TWENTY-EIGHTH SCHEDULE.

Upon reading the affidavit of A. B. sworn the day of 18 [recite any other affidavits used on the application and if evidence vivâ voce shall be given either with or without affidavits add or say "upon hearing the evidence of C. D. &c."] and upon hearing E. F. of in person [or Mr. of counsel (or attorney) for E. F. of] [and if the application be on notice and the other party appear then add "and upon hearing G. H. (the other party) of in person"] [or Mr. of counsel (or attorney) for the said G. H. or if the other party do not appear say "and upon service of notice of this application upon G. H. being proved to my satisfaction"] I one of Her Majesty's Wardens of the Gold-fields in and for Victoria, do hereby order that [state the matter in the words of the Act as near as may be].

Given under my hand this day of One thousand eight hundred and ninety.

Warden.

Section 249.

TWENTY-NINTH SCHEDULE.

To the Bailiff of the Court of Mines of the Mining District of and the Keeper of the Gaol at

These are to command you the said bailiff to take and to convey him to the said gaol and to deliver him to the said keeper thereof, and you the said keeper are hereby required to receive the said into your custody in the said gaol and him there safely to keep until I the undersigned warden or a judge of a Court of Mines shall otherwise order, or until the said shall be otherwise discharged in due course.

Given under my hand this day of 18 Warden.

Section 252.

THIRTIETH SCHEDULE.

I certify that on the day of A. D. 18 a sum of pounds was ordered by me to be paid to by by way of debt [or damages or damages and costs or costs as the case may be].

Dated this day of A. D.

Warden.

THIRTY-FIRST SCHEDULE.

Section 254.

In the Court of Mines for the District of

To [here insert the names of the several persons in whose favour the decision of the Warden or assessors may have been given].

Take notice that we the undersigned being desirous of appealing from the decision of Mr. Warden [or of the assessors] made in a proceeding before him [or before Mr. Warden and the said assessors] on the day of at and in which you were complainants [or defendants as the case may be] and we the undersigned were defendants [or complainants as the case may be] and which decision was to the following effect [here insert minute of decision appealed against], intend to appeal to the Court of Mines to be holden at on the day of next against such decision and that the grounds of appeal against the said decision are as follows :—

[Here state the grounds of appeal, each ground to be the subject of a separate paragraph, and no general word such as "and other grounds" shall be inserted].

You are therefore called upon to show cause why the said decision shall not be [here state whether total reversal sought or whether an alteration only, and if an alteration only then state exact nature of relief sought].

A.B. }
C.D. } Names of parties appealing.

THIRTY-SECOND SCHEDULE.

Section 282.

To the Bailiff of the Court of Mines of the Mining District of
and to the Keeper of the Gaol at

These are to command you the said bailiff to apprehend O.B. and to convey him to the said gaol and deliver him to the said keeper thereof, and you and the said keeper are hereby required to receive him into your custody in the said gaol and him there safely to keep for the term of [unless the sum of shall be sooner paid]. I the undersigned judge of the said court [or warden] having now here adjudged the said O.B. [to pay a fine of and in default of immediate payment thereof] to be imprisoned for the said term for that he the said O.B.

[Here state the case as follows:]

has now during my sitting in my office as such judge [or warden] wilfully insulted me the said judge [or warden] [or an assessor bailiff &c. as the case may be] lawfully in attendance during my sitting or interrupted the proceedings of the said court (or before me) or having been summoned as a witness in a suit (or appeal or complaint) before me between &c. &c. refused to be sworn or being sworn as a witness before me refused to answer a certain lawful question that is to say "Whether &c." or being guilty in the opinion of me the said judge (or warden) of prevarication as such witness (or misbehaved himself towards the said court or during my sitting in my office as warden).

Given under my hand this day of
A.B.,
Judge of the said Court [or Warden].

THIRTY-THIRD SCHEDULE.

[Repealed by No. 1514].

THE MINES ACT 1890.

THIRTY-FOURTH SCHEDULE.

[Repealed by No. 1514].

THIRTY-FIFTH SCHEDULE.

[Repealed by No. 1514].

THIRTY-SIXTH SCHEDULE.

Section 383.

In the Mining District of

In the matter of Division two of Part III. of the *Mines Act* 1890.

Owner of Machinery, and

Owner of Mine at [*here insert place of mine*].

I [A.B.], a Warden of the Gold-fields, having proceeded under the provisions of the Division two of Part III. of the *Mines Act* 1890 to ascertain and determine what would be the fair share to be borne by the said [*here name of owner of mine*] of the total expense of draining or drawing the water from the mines drained by the machinery of the said [*the name of owner of machinery*], do hereby assess the same at [*here state amount and whether in one sum or in various sums at various periods, such periods to be stated*]: And I do order the said [*name of owner of mine*] to pay the same moneys to the said [*name of owner of machinery*] in respect of the land or ground occupied or used by the said [*name of owner of mine*] at [*place of mine*] and known as [*describe mine*]. And I order that the said money be paid as follows [*here state time or times of payment, and if considered desirable by warden, place of payment, as a bank or otherwise*]: And I impose the following terms upon the said [*name of owner of machinery*] [*here state the terms imposed*]: And I order compliance with this order by the several parties herein named and all those claiming or deriving title through them.

Dated this

day of

A.B., Warden.

Section 384.

THIRTY-SEVENTH SCHEDULE.

In the Mining District of

To the Clerk of the Court of Mines at

In the matter of the Division two of Part III. of the *Mines Act* 1890.

I [A.B.], Warden, certify that I did on the _____ day of
A.D. 18 ____ make an order in the following terms [*here set out copy of warden's order*].

Dated this

day of

A.D.

A.B., Warden.

APPENDIX (B).

THE MINES ACT 1897

(61 VIC. No. 1514).

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An Act to amend the Law relating to Mining.

[27th September, 1897.]

BE it enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows (that is to say) :—

1. (1) This Act may be cited as the *Mines Act 1897*, and shall short title. come into operation on the first day of November One thousand eight hundred and ninety-seven.

Citation. (2) This Act and the *Mines Act 1890* (hereinafter called the
No. 1120. Principal Act) and any Act amending such Acts may be cited together as the Mines Acts.

Repeal. 2. The Acts mentioned in the First Schedule to this Act to
First Schedule. the extent to which the same are thereby expressed to be repealed are hereby repealed.

Savings. Provided that save and except where by this Act it is otherwise expressly provided such repeal shall not affect any Board elected or any district erected or any proclamation appointment election rule regulation by-law order registration valuation nomination complaint application declaration affidavit assignment award grant or decree made or any miner's right consolidated miner's right licence debenture precept writ plaint summons or summons issued or any warrant or injunction granted or any notice notification certificate or security given or any service effected or any agreement lease contract mortgage bond recognisance conveyance transfer or deed existing in force effected entered into executed or any compensation due or payable under the said repealed enactments or any of them before the commencement of this Act.

Division of Act. 3. This Act is divided into Parts, Divisions, and Subdivisions, as follows, namely :—

- | | | |
|---|---|--|
| PART I.—
Mining
on Crown
Lands. | { | <ul style="list-style-type: none"> (1) Miner's Right. (2) Residence Areas. (3) Mining Leases. (4) Breach of Labour Covenants. (5) Licence to search or cut Races. (6) Miscellaneous Provisions relating to Leases or Licences. (7) Mining Boards. (8) Miscellaneous. |
| PART II.—
Mining
on
Private
Property. | { | <ul style="list-style-type: none"> (1) Preliminary. (2) Grant of Leases of Private Land. (3) Entry upon and marking out Private Land. (4) Purchase Money or Compensation payable to Owner or Occupier of Private Land. (5) Prospecting Area on Private Land. (6) Jurisdiction. (7) Renewal of Lease and Pendency of Application. (8) Breach of Labour Covenant. (9) Encroachment. (10) Power of Survey. (11) Miscellaneous. |

PART III.— General Provisions.	}	Division 1.— Regulation and inspec- tion of Mines and Mining Machinery.	}	(1) Regulation of Em- ployés.
				(2) General Rules.
				(3) Boards of Examiners for Engine-drivers.
				(4) Mining Managers.
				(5) Engine-drivers.
				(6) Boilers.
				(7) Plans of Mines.
				(8) Compensation to Em- ployés for Injury.
				(9) Inspection.
				(10) Inquests.
				(11) Miscellaneous.
				(12) Regulations.
		Division 2.—Drainage of Mines.		(1) Tribute Agreements.
		Division 3.—	}	(2) Court of Mines in Mel- bourne.
				(3) Priority of Wages.

In this Act unless inconsistent with the context "Part" means Part of this Act, "Division" means Division of Part, "Sub-division" means Subdivision of Division or Part, and "section" means section of this Act.

PART I.—MINING ON CROWN LANDS.

4. This Part shall be read and construed as one with Part I of the Principal Act. Construction
of Part.

5. In this Part if not inconsistent with the context or subject-matter— Interpretation.
Compare No.
1120, s. 377.

"Applicant" includes any person to whom an interest in any application for a mining lease has been transferred pursuant to this Act ;

"Lessee" includes executor or administrator of a lessee or the transferee of a lessee with the consent of the Governor in Council and includes any person to whom the interest of a lessee comes by operation of law ;

"Mineral" or "Minerals" means all minerals mineral ores and metals other than gold ;

"Regulations" means regulations made pursuant to Part I of the Principal Act and this Part ;

“Sub-tributer” means any person who has with the consent of the lessee or owner of the mine made an agreement with the tributer of a mine or claim or portion of a mine or claim upon the terms of paying a portion or percentage of the gold or minerals or of the value of the gold or minerals taken from such mine or claim to such tributer for the right to mine therein or thereon and shall also mean any person who has made such an agreement with another sub-tributer; and

“Tributer” means a person who works a mine or portion of a mine under an agreement with the lessee or owner of the mine or claim to pay such lessee or owner a portion or percentage of the gold or minerals or of the value of the gold or minerals taken from such mine or claim.

Subdivision 1.—Miner's Right.

Miners' rights
extended to all
minerals.
See No. 1120, s. 5.

6. Notwithstanding anything contained in the Mines Acts it is hereby declared that the rights and privileges conferred on any holder of a miner's right with regard to gold are hereby also conferred on such holder with regard to all minerals, and the Mines Acts shall be read and construed accordingly, and any reference in the said Acts enabling the holder of a miner's right or the holders of a consolidated miner's right to mine for gold shall subject to the by-laws be deemed to authorize such holder or holders also to mine for any mineral.

Miners' rights
may operate
from a future
day.
See No. 1120, s. 5.

7. (1) Notwithstanding anything contained in the Mines Acts miners' rights or business licences may be issued expressed to be in force from a future day named therein.

(2) Every miner's right or business licence shall continue in force notwithstanding the death of any person named therein.

Fee for miner's
right reduced.

8. Notwithstanding anything contained in section four of the Principal Act the sum payable for any miner's right issued after the commencement of this Act shall be reduced to the rate of Two shillings and sixpence for every year for which the right is to be in force.

The sum charged for a “consolidated miner's right” shall be reduced at a proportionate rate.

9. (1) Notwithstanding anything contained in section five of the Principal Act every holder of a miner's right and every person on whose behalf any consolidated miner's right is held shall for the purposes of exercising the privileges granted to them respectively by the said section be entitled to cut any live or dead timber, except blackwood, and to remove the same from any portion of Crown land being or included in any land proclaimed as a reserve for the preservation and growth of timber.

Power for holder of miner's right to cut and remove timber from certain reserves.

See No. 1120, s. 5.

(2) The privilege conferred by this section shall not be exercisable except in such Crown land reserves as the Governor in Council by notice published in the *Government Gazette* may specially proclaim for the purpose, nor shall such privilege be exercisable except in such manner and at such times as may be directed by regulations made for the purpose under the provisions of the Land Acts.

In what reserves power to be exercised.

10. For the last proviso to section eight of the Principal Act there shall be substituted the following proviso, namely:—

Amendment of section 8 of No. 1120.

Provided also that notwithstanding anything herein contained it shall be lawful for the owners of any two or more adjoining claims to amalgamate the same in such number in such manner and under such conditions as shall be permitted by the by-laws of the mining district in which such claims are situated. [cf. 56 & 57 Vic. No. 587 (S.A.), sec. 46 ; 62 Vic. No. 38 (N.Z.), sec. 129].

Amalgamation of claims.

11. For section seventeen of the Principal Act there shall be substituted the following section, namely:—

Amendment of section 17 of No. 1120.

17. The Governor in Council may at any time either by a general or particular description except from occupation for mining purposes or for residence or business under any miner's right or business licence or from being leased under a mining lease any specific portion of Crown lands or any class of Crown lands ; and no land so excepted or included in any class so excepted shall be occupied under any miner's right or business licence until such exception be revoked nor until revoked shall it be lawful for any person to mark out or apply for a mining lease of such land or any part thereof, and any such marking out or application shall be null and void. [cf. 37 Vic. No. 13 (N.S.W.), sec. 26 ; 62 Vic.

Crown lands may be excepted.

See No. 1120, s. 14.

No. 1263, s. 2.

See sec. 24, post.

No. 24 (Q.), sec. 47 ; 57 Vic. No. 24 (Tas.), sec. 191 ; 59 Vic. No. 40 (W.A.), sec. 22 ; 62 Vic. No. 38 (N.Z.), Part III].

Amendment of section 26 of No. 1120.

12. In section twenty-six of the Principal Act after the words "such race" wherever occurring there shall be inserted the word "drain."

Duplicate of miner's right or business licence.

13. Where the holder of a miner's right or business licence has accidentally lost or destroyed the same before the expiry of the time for which it was issued a duplicate thereof may be issued to him for the balance of such term, at a fee of One shilling.

Subdivision 2.—Residence Area (a).

Index to register of residence areas.

See No. 1120, s. 28.

14. Every book in which residence areas are registered by the mining registrar or other proper officer shall be by such registrar or officer indexed alphabetically and separately with reference to the situation of the area and the name of each holder in the said book.

Where registration cancelled warden may direct applicant to be registered as holder.

See No. 1120, ss. 32, 33.

15. Where the warden makes an order that the registration of any residence area be cancelled he may by the same or a subsequent order direct that the holder of a miner's right on whose application such registration has been cancelled be registered as the holder of such area by the mining registrar or other proper officer provided that no such order for registration shall be made unless the nature of the order required be described in the summons issued upon the complaint of the applicant.

Removal of plant from cancelled residence area.

16. (1) In the event of the registration of a residence area being cancelled by order of a warden, the person who was registered as the holder thereof may within such time after the making of the order for such cancellation as may be fixed by the warden in such order remove any buildings plant machinery engines or tools on or within the land comprised in such residence area.

(2) If the said person does not remove such buildings plant machinery engines or tools within the time so fixed, the warden may upon the complaint of the person upon whose application such registration was cancelled or who is otherwise entitled to occupy such residence area call upon the said person to show

cause within such time as the warden may allow why such buildings plant machinery engines or tools should not be sold by auction and removed.

(3) If the said person does not within such time remove such buildings plant machinery engines or tools or show sufficient cause, of which the warden shall be the sole judge, the warden may direct that such buildings plant machinery engines or tools be sold by public auction and be removed. The proceeds of the sale of such buildings plant machinery engines or tools after deducting the cost of selling or selling and removing the same shall be paid to such person or any person entitled to such buildings plant machinery engines or tools of whose claim the warden shall prior to such sale have received notice in writing.

17. No registration of a residence area made before the commencement of this Act shall be deemed to be invalid or insufficient by reason only—

Protection of certain residence areas.

(a) That a previous registration thereof had not been cancelled provided it be proved either that the last registered miner's right or business licence as the case may be held by the person who effected such previous registration had expired or that such person had abandoned the residence area, or

Reid v. Gunn,
13 V.L.R., 723.
See No. 1120,
s. 28.

(b) that the number of the holder's miner's right has been insufficiently or incorrectly registered.

18. (1) In section forty-four of the Principal Act for the word "fifty" there shall be substituted the words "one hundred."

Amendment of section 44 of No. 1120.

(2) In section forty-eight of the Principal Act after the words "Crown grantee of the same" there shall be inserted the words "when sold limited in depth."

See No. 1215,
s. 7.

Amendment of section 48 of No. 1120.

See *ib.* s. 8.

19. If it be proved to the satisfaction of the Minister—

(a) that buildings or other improvements have been erected or made on any land being a residence area and comprised in any gold mining lease or mineral lease issued under the provisions of the Principal Act or any enactment thereby repealed either before or after the coming into operation of this Part, and

When residence area situated on surface of land comprised in gold mining or mineral lease and such surface not required for mining or public purposes holder may purchase.

See *ib.* s. 2.

See No. 1120,
ss. 22, 36.

- (b) that the holder of such land as a residence area has been in possession thereof for a period of at least two years and a half and that he has complied with the provisions of Subdivision (4) of Division 1 of Part I of the Principal Act, and has not signed any agreement to remove when called on by the grantee to do so, and
- (c) that three months' notice in writing of the intention to purchase has been given by such holder to the grantee of such gold mining or mineral lease or other the person in lawful occupation of the land leased and claiming through such grantee, and
- (d) that no objection to such intended purchase has been made by the grantee or other person or if made has been made on insufficient grounds, and that the residence area or so much thereof as is included in any such gold mining lease is not auriferous or so much thereof as is included in any such mineral lease does not contain minerals in such quantity or proportion as to be of economic value or that such residence area is not required for a site for machinery or for the storage of sludge or for carrying on of any other mining operations, and that there is no other reason of a public nature why such residence area should not be sold—

then the holder of such land shall have the exclusive right of purchasing the surface of such land on which such buildings are or other improvements have been erected or made at a price to be determined by an appraiser appointed by the Board of Land and Works, and the same may be sold accordingly.

Objection to
sale by grantee
or occupier.
No. 1215, s. 3.

20. (1) Any such grantee or other person as aforesaid may within twenty-one days after the receipt by him of the notice of intention to purchase by writing addressed to the Minister, object to such purchase, and in such writing shall state the grounds of his objection, and no objection shall be heard or entertained as hereinafter mentioned unless the grounds are stated therein unless by permission in writing of the Minister.

(2) Such grantee or other person shall at the time of forwarding such objection to the Minister forward to the residence area holder a copy of his objection as addressed to the Minister.

21. (1) The Minister shall on receipt of such objection instruct the warden of the district to hold an inquiry as to the sufficiency or otherwise of the objection.

Warden to inquire into grounds of objection.
No. 1215, s. 4.

(2) Such inquiry shall be held so far as is reasonably practicable in accordance with the regulations for the time being in force relating to mining leases and objections thereto, which shall *mutatis mutandis* be applicable to all inquiries under this Part, but no money shall be required to be deposited by any objector under this Part. All evidence taken before the warden on any such inquiry shall be upon oath, which such warden is hereby authorized to administer.

(3) At the conclusion of the inquiry the warden shall transmit to the said Minister for his consideration all the evidence taken by him whether oral or documentary together with his opinion on the sufficiency or otherwise of the objection, and the said Minister shall decide upon the sufficiency or otherwise of the objection, and his decision shall be final.

(4) If the Minister by his decision refuses to permit such land to be purchased on the ground that the same is auriferous or that the same contains minerals in such quantity or proportion as to be of economic value or that the same is or is likely to be required as a site for machinery or for the storage of sludge or for carrying on any other mining operations or on any other ground of a public nature, such grounds shall be stated and published in the *Government Gazette* so soon after such refusal as is practicable.

If objection upheld reasons for same to be published in *Gazette*.
See *ib.* s. 5.
No. 1281, s. 2.

22. When the surface of any land is sold under the provisions of this Part the same shall be sold in fee simple together with the earth below the same down to such depth not exceeding one hundred feet as the Governor in Council shall previously determine and subject to such covenants conditions exceptions and reservations as the Governor in Council may direct; and such land shall before being so sold be excised to such depth as aforesaid from such gold mining or mineral lease by an Order in Council, which when published in the *Government Gazette* shall have full force and effect, and the lessee mentioned in such lease his executors administrators or transferees shall not be entitled to any abatement of rent or be relieved from the due fulfilment of any covenants of such lease.

Power to fix depth of residence areas sold under this Act and to excise same from lease.
No. 1215, s. 6.

Declaration by
appraiser.

No. 1215, s. 9.

See No. 1120, ss.
22, 37.

23. Any appraiser to be appointed under this Part shall before entering into the consideration of any matters referred to him make a declaration in the form prescribed by section thirty-seven of the Principal Act substituting for the title of the said Act therein a reference to the Mines Acts.

Governor in
Council not to
except residence
areas from
occupation &c.;
No. 1263, s. 2.

24. (1) Notwithstanding anything contained in the Land Acts or the Mines Acts it shall not be lawful for the Governor in Council to except from occupation for residence or business under any miner's right or business licence any Crown land which on the third day of October One thousand eight hundred and ninety-two was in fact occupied as a residence area by the holder of a miner's right or business licence.

until payment
of compensation.
See No. 1120,
s. 43.

(2) Sub-section (1) of this section shall not apply to any land so held as a residence area after the holder thereof shall receive compensation for the value of his interest in such area together with the value of any buildings or other improvements erected or made thereon. Such value shall be ascertained and determined in the manner provided in sections thirty-six and thirty-seven of the Principal Act with regard to ascertaining the compensation payable for land of which the Crown requires to resume possession for public or other purposes.

Non-registration
not to prevent
application of
section.

(3) Sub-section (1) of this section shall extend to any Crown land purporting to be occupied as a residence area at such date if at any previous time such land has been duly registered as a residence area and the person occupying the same at such date has been registered as the holder thereof.

Regulations.
No. 1263, s. 3.

(4) The Governor in Council may make regulations generally for carrying out the provisions of this section.

Subdivision 3.—Mining Leases.

Effect of miners'
rights issued
since 29th
December 1884.

25. Subject to the provisions of this Part and to the by-laws made as in the Mines Act provided—

Consolidated
from No. 1202,
s. 2 (a) (1).

(a) the holder of a miner's right shall by Division II (Miscellaneous) of Part I of the *Land Act* 1890 be deemed to have, and the holder of any miner's right issued since the twenty-ninth day of December One thousand

eight hundred and eighty-four shall be deemed to have had, the right to enter upon any land being a pastoral allotment or grazing area (as the case may be) and to search for gold and to mine thereon and to erect and occupy mining plant or machinery without making compensation to the lessee thereof for surface or other damage, and

- (b) the Governor in the name and on behalf of Her Majesty may grant, and by virtue of and pursuant to section forty-nine of the Principal Act shall be deemed to have power to grant, and by virtue of and pursuant to section twenty-four of the Principal Act (a) shall be deemed to have had from the twenty-ninth day of December One thousand eight hundred and eighty-four power to grant, leases giving the holder thereof the right to enter upon any land being a pastoral allotment or grazing area (as the case may be) and to search for gold and to mine thereon and to erect and occupy mining plant or machinery without making compensation to the lessee thereof for surface or other damage.

Power of Governor as to granting leases over pastoral allotments or grazing areas. See No. 1106, s. 118. No. 1202, s. 2 (b) (1).

26. (1) Pursuant to the provisions of Part I of the Principal Act the Governor in the name and on behalf of Her Majesty may grant mineral leases giving the holder thereof the right to enter upon any land being a pastoral allotment or grazing area demised either before on or after the first day of March One thousand eight hundred and ninety-two, and to search for any mineral and to mine thereon for such mineral and to erect and occupy mining plant or machinery without making compensation to the lessee thereof for surface or other damage.

Power to grant mineral leases on pastoral allotments or grazing areas. See No. 1251, s. 5.

(2) Only one mineral lease shall under the provisions of this section be granted or in force at any one time in respect of the same land.

27. For section fifty-three of the Principal Act there shall be substituted the following section, namely:—

Amendment of section 53 No. 1120.

(a) This is incorrect and misleading; for "the Principal Act" should be read "*The Mining Statute 1865*" (No. 291), section 24 of which is re-enacted by section 49 of Act No. 1120; see Act No. 1102, sec. 2 (b) 1. Section 24 of the Principal Act (No. 1120) does not refer to leases.

Leases of mines under lands granted or reserved for public purposes may in certain cases be made.

See No. 1251, s. 7.

53. The Governor in Council in the name and on behalf of Her Majesty upon application made to him for that purpose may grant leases to any person of mines in under or upon lands granted or reserved for railways waterworks public parks places of recreation or other public purposes, subject to such regulations as may be from time to time passed by the Governor in Council for that purpose and with the consent of the Board of Land and Works or the Victorian Railways Commissioner in whom the said lands are vested. [cf. 37 Vic. No. 13 (N.S.W.), sec. 34 ; 62 Vic. No. 24 (Q.), sec. 46 ; 59 Vic. No. 40 (W.A.), sec. 33].

Amendment of section 54 No. 1120.

28. For section fifty-four of the Principal Act the following section shall be substituted, namely :—

Term and rent of gold mining leases.

54. (1) In the case of a gold mining lease the term for which the same may be granted shall not exceed fifteen years from the time of granting the same, and the yearly rent to be payable in respect thereof shall be Two shillings and sixpence for every acre demised.

Area and term of mineral lease.
See *ib.* s. 8.

(2) In the case of a mineral lease the extent of the area thereof shall not exceed six hundred and forty acres and the term for which the same may be granted shall not exceed fifteen years from the time of granting the same, and the yearly rent to be payable in respect thereof shall be at such rate not being less than One shilling nor more than One pound for every acre demised, and so on in proportion for any less quantity, as the Minister may determine. [cf. 37 Vic. No. 13 (N.S.W.), secs. 36, 37 ; 62 Vic. No. 24 (Q.), sec. 26 ; 56 & 57 Vic. No. 587 (S.A.), sec. 51 ; 57 Vic. No. 24 (Tas.), sec. 39 ; 59 Vic. No. 40 (W.A.), secs. 34, 35].

Surrender of leases and issue of consolidated lease.

See s. 56, of Act 1120.

29. Notwithstanding anything contained in any Act it shall be lawful to make application in accordance with the regulations for leases, and leases may be granted comprising Crown lands reserved lands and private lands or any of them, and the holder of any mining leases of Crown lands reserved lands and private lands or any of them shall be entitled at any time with the consent of the Governor in Council to surrender the same, and it shall be lawful for the Governor in Council to grant to such holder a consolidated lease for any term not exceeding fifteen years of the whole or any portion of the lands comprised in such surrendered leases, and any such new lease may with the like consent be renewed from time

to time for any period not exceeding fifteen years at each renewal. Provided that the rent payable on any such new lease shall be adjusted according to the areas of the several classes of land comprised therein and shall be subject to the covenants and conditions prescribed by the regulations which shall at the time of the granting thereof be in force and applicable to the lease required or such other covenants and conditions as to the Governor in Council shall seem fit. Provided further that before any such new lease shall be granted the proposed lessee shall pay such fine not exceeding Ten pounds as the Governor in Council shall direct. Provided further that if such proposed consolidated lease shall comprise private lands compensation shall be assessed in accordance with the provisions of this Act in respect of any portion of the term thereof for which compensation shall not have been already assessed. [cf. 48 Vic. No. 10 (N.S.W.), sec. 6; 59 Vic. No. 40 (W.A.), sec. 41; 62 Vic. No. 16 (W.A.), sec. 13; 63 Vic. No. 29 (N.Z.), sec. 9].

30. One of the covenants of every mining lease shall be a Labour covenant. covenant by which the lessee shall be bound to provide for the employment in the construction of the works or in mining operations on or under the land demised and granted unto the said lessee during the term for which the lease has been granted and during the usual hours of labour of a certain number of able and competent workmen and miners (not being Chinese) unless prevented by inevitable accident or during the execution of repairs, and such number shall be specified in each lease.

Subdivision 4.—Breach of Labour Covenants (a).

31. (1) If the lessee of a mining lease in respect of any land commits a breach of the labour covenant of such lease it shall be lawful for any holder of a miner's right to apply to the Minister in the form set out in the Second Schedule to this Act or to the like effect. Where breach of labour covenant of lease holder of miner's right may apply for inquiry. Second Schedule.

(2) If such application be made and the person so applying lodges with or forwards to the clerk of the warden the sum of Five pounds as security for costs, the Minister may if he think

(a) cf. 59 Vic. No. 40 (W.A.), secs. 45-48; Regulations under 37 Vic. No. 13 (N.S.W.), April 4, 1882; 56 & 57 Vic. No. 587 (S.A.), sec. 108; 57 Vic. No. 24 (Tas.), sec. 43; 62 Vic. No. 38 (N.Z.), sec. 85].

fit refer the said application to the warden with directions to hold a public inquiry concerning the alleged breach.

Warden to hold inquiry and report to Minister.

32. (1) The warden shall give to the parties such notice to attend at the inquiry as he thinks necessary, and on failure of either party to attend thereat he may proceed *ex parte*. In case the lessee be dead or cannot be found notice in the *Government Gazette* shall be sufficient.

(2) On such inquiry the warden shall hear and examine the parties and their witnesses on oath and shall reduce their evidence to writing and shall forward the same together with a report and recommendation thereon to the Minister, and if the warden considers that there has been a breach of the labour covenant he may recommend that the lease be declared void as to the whole or any part of the land comprised therein.

(3) The warden in his discretion may allow to the lessee costs not exceeding Five pounds to be taken out of the deposit made by the person or persons so applying as aforesaid. Provided that such costs shall not be payable unless the application be refused by the Minister.

Appeal from warden to Minister.

33. (1) If either party be dissatisfied with the recommendation of the warden he may within ten days after such hearing make a written appeal to the Minister who may if he thinks fit hold a further public hearing at some place and time to be fixed by him and of which notice shall be given by him to the parties interested respectively.

(2) The mode of conducting such public hearing shall be in the discretion of the Minister who is hereby empowered to hear receive and examine evidence on oath in the matter of the complaint.

Governor in Council to determine breach of labour covenant.

34. Where no such appeal is made within the time aforesaid then after considering the warden's report and recommendation, or where an appeal has been made and a public hearing held then after considering the evidence thereat, the Minister if he is of opinion that a breach of the labour covenant has been committed shall submit the matter for the determination of the Governor in Council.

35. In submitting the matter to the Governor in Council the Minister may recommend that the lease be declared void and the Governor in Council may by order published in the *Government Gazette* declare the lease void as to the whole or any part of the land comprised therein accordingly ; and such order shall be absolutely final and conclusive and shall be deemed valid and given effect to notwithstanding any non-compliance with any provision of the Mines Acts.

Minister may recommend lease to be made void.

36. Where the Governor in Council so declares any lease to be void as aforesaid it shall be lawful for the Governor in the name and on behalf of Her Majesty, but subject to section sixty-nine of the Principal Act, to grant to the person so applying a lease of the whole or any portion of the land held under the determined lease for such term not exceeding fifteen years as the Governor thinks fit, or the person so applying may mark out a claim of the whole or any portion of the land with respect to which such lease has been determined. No other person shall be or be deemed to be entitled to enter on or mark out any such land either under the by-laws or for a lease for a period of fourteen days from the date of the publication in the *Government Gazette* of such avoidance or pending the issue of a lease authorized by the Governor in Council to be granted.

New lease may be granted where lease made void.

37. (1) In the event of a lease being declared void any person (in this and the next following section called the new lessee) who is granted a lease of the whole or any portion of the land held under the determined lease shall be entitled within one month after the expiration of the time fixed by the Governor in Council for the removal of the plant machinery engines or tools on or within the land comprised in such determined lease, to give notice to the lessee of the determined lease (in this and the next following section called the former lessee) of intention to purchase at a valuation the whole or any portion of any plant machinery engines or tools on or within the land comprised in such new lease and not then removed.

Right of new lessee after a certain time to purchase plant &c. of void lease.

(2) Such notice shall be in writing and shall specify such of the said plant machinery engines or tools as the new lessee so desires to purchase and shall state what price he is willing to pay for the same.

(3) The former lessee shall be deemed to be willing to accept and shall accept from the new lessee the price offered, unless within fourteen days after receiving the said notice the former lessee in writing declines to accept the price offered, and desires the valuation to be determined by arbitration and informs the new lessee in writing of the name and description of some person whom he desires to act as his arbitrator.

(4) Unless within seven days after being so informed the new lessee notifies in writing to the former lessee the name and description of some person whom he desires to act as his arbitrator, the arbitrator appointed by the former lessee shall act as a single arbitrator.

(5) Unless within seven days after the appointment of both arbitrators, the two arbitrators in writing appoint an umpire, then at the request of either the former lessee or the new lessee the Minister shall in writing appoint some fit and proper person to be umpire.

(6) The two arbitrators and the umpire shall sit together and hear evidence upon oath and call for the production of documents and the amount of the valuation and the time within which the same shall be paid by the new lessee shall be determined by the arbitrators on a joint equitable basis. In the event of the arbitrators not agreeing upon a determination within seven days after such hearing the umpire shall within seven days after such hearing make a determination on a like basis. Every determination shall be final and conclusive and may be made a rule of the Supreme Court.

Removal of
plant.

38. (1) In the event of a lease being declared void the lessee of such lease or other person entitled to any plant machinery engines or tools hereinafter mentioned may within such time being not less than three months after the publication of the notice that the lease has been declared void as may be fixed by the Governor in Council remove any plant machinery engines or tools on or within the land comprised in such lease but shall not remove or destroy any timber used in and for supporting the shafts drives galleries or adits in the mine nor any plant machinery engines or tools purchased by the new lessee.

(2) If the said lessee does not remove any such plant machinery engines or tools within the time so fixed, the Minister may call upon the said lessee or person to show cause within such time as the Minister may allow why such portion of the plant machinery engines or tools as in the opinion of the Minister interferes with the proper and efficient working of the mine should not be sold by auction and removed.

(3) If the said lessee or person does not within such time show sufficient cause, of which the Minister shall be the sole judge, the Minister may direct that such portion of the plant machinery engines or tools be sold by public auction and be removed. The proceeds of the sale of such plant machinery engines or tools after deducting the cost of selling or removing the same shall be paid to such former lessee or other person entitled to such plant machinery engines or tools of whose claim the Minister shall prior to such payment by him of any such proceeds have received notice in writing.

(4) The Minister shall determine whether or not any of such plant machinery engines or tools shall be allowed to remain on the land so leased, and, if so, for what period they may so remain, and what rent the former lessee shall pay to the new lessee for the use and occupation of the ground on which the same are allowed to remain. [cf. 56 & 57 Vic. No. 587 (S.A.), sec. 110 ; 62 Vic. No. 38 (N.Z.), sec. 170].

39. When pursuant to section thirty-one any application has been referred to the warden the warden shall also inquire respecting the value to the holder or holders of a miner's right or rights making such application of any work or labour then done by or paid for by the lessee on or within or beneath the leased land and premises which in the warden's opinion is available or necessary for any future mining operations.

Inquiry as to value of work done.

40. No sum shall be allowed or paid for any such work or labour where it is proved to the satisfaction of the warden that the lessee has neglected to fulfil the covenants of the lease for a period of twelve months previous to the said application having been made by the holder or holders of a miner's right or rights.

No allowance for certain cases.

41. In case the lease is declared void the said holder or holders of a miner's right or rights making the said application shall not

Deposit before new lease issued.

receive a lease of or work as a claim the land applied for until he or they shall have deposited with the Minister for payment to the former lessee the amount found by the warden as the value of the said work and labour done by or paid for by such former lessee and such amount shall be paid to the warden's clerk at such place and within such time as the Minister may direct being within three months of such finding having been made, and in the event of such amount not being paid in the time aforesaid then the said application for a lease may be declared abandoned.

Notice in case of suspension of labour covenants.

42. (1) Where any suspension of the labour covenant of a lease has been granted wholly or in part by the Minister he shall forthwith cause to be forwarded to the mining registrar and to the warden's clerk for the division of the mining district in which such lease is situated and also to the postmaster of the post office nearest to the leased land and to the lessee particulars in the form of the Fifth Schedule hereto.

Fifth Schedule.

(2) Such registrar clerk and postmaster shall forthwith post such particulars at their offices and keep the same posted during the period for which such suspension has been granted and any holder of a miner's right shall be at liberty without payment of any fee to inspect any such notice at all reasonable times.

(3) Such lessee shall post such notice on some conspicuous place on the leased land and shall keep the same posted during the period for which such suspension has been granted.

Subdivision 5.—Licence to search or cut Races.

Licences to search for metals and minerals other than gold may be granted. Compare No. 1120, s. 63. No. 1251, s. 9.

43. (1) The Governor in Council or any person authorized by him in that behalf may grant to any person, subject to the provisions of the Mines Acts and to the regulations made thereunder, a licence to enter upon any pastoral allotment or grazing area or lands known as the mallee country or lands leased for the cultivation of wattle trees under the provisions of the *Wattles Act* 1890 not occupied by the holder of a miner's right or business licence (unless with the consent of such holder) for the purpose of searching for gold or any mineral.

(2) Notwithstanding any such regulations it shall be lawful for the Governor in Council at the time of the granting of any such

licence to fix specially the fee to be paid in respect thereof and the conditions upon which the same shall be granted.

44. In section sixty-four of the Principal Act the expression " Crown lands " wherever it occurs shall be deemed and taken to include—

- (a) any pastoral allotment or grazing area ; or
- (b) any land licensed or leased on or after the twenty-ninth day of December One thousand eight hundred and eighty-four under any Act relating to Crown lands with the right of acquiring the fee-simple of such land ; or
- (c) any mallee block or mallee allotment in respect of which a lease or perpetual lease is issued ; or
- (d) any land in respect of which a lease for the cultivation of wattle trees is issued ;

Extension of section 64 of Mines Act 1890 relating to licences to construct water races &c. See No. 1209, s. 10.
See No. 1120, s. 64.
See No. 1251, s. 10.

and the said expression wherever it so occurs shall be deemed to be followed by the words " or any land alienated from the Crown in fee simple on or after the twenty-ninth day of December One thousand eight hundred and eighty-four."

45. (1) Any person holding a licence under the provisions of section sixty-four of the Principal Act and the executors administrators or assigns of any such person shall be entitled at any time with the consent of the Governor in Council to surrender the same.

Licences to cut and construct races dams &c. may be surrendered. *Ib.* s. 11.

(2) The Governor in the name and on behalf of Her Majesty may grant to such person a renewal of such licence for any term not exceeding fifteen years ; and any such renewed licence may with the like consent be renewed from time to time for any period not exceeding fifteen years at each renewal.

See No. 1120, s. 64.

(3) Such new licence shall be at the fee then chargeable by law in respect of a licence held under section sixty-four of the Principal Act, and shall be subject to the covenants and conditions prescribed by the regulations at the time of the granting thereof in force and applicable to the particular licence required or such other covenants and conditions as to the Governor in Council shall seem fit.

Subdivision 6.—Miscellaneous Provisions relating to Leases or Licences.

Section 68 of Principal Act incorporated.
See No. 1120, s. 68.

46. Section sixty-eight of the Principal Act shall apply to private land. Provided that the application for a lease by the holder of the claim shall not be subject to the provisions of this part relating to compensation.

Amendment of section 69 of *Mines Act 1890.*

47. In section sixty-nine of the Principal Act for the words "one month" there shall be substituted the words "seven days."

Power for applicant for lease to transfer his interest subject to regulations.

See Transfer of Land Act, sec. 40.

48. Any applicant for a mining lease may with the approval of the Minister and in accordance with the regulations transfer the whole or any portion of his interest in his application to any person. And in the event of the death of an applicant for a lease such lease may be granted in the name of such applicant and be executed by his executor or administrator and shall devolve or pass in like manner as if the lease had been executed prior to the death of the applicant.

Not lawful for holder of a miner's right to mark out land for which renewal of lease applied for.

See No. 1251, s. 12.

See No. 1120, s. 70.

49. During the pendency of any application under the Mines Acts for the renewal of a gold mining lease or a mineral lease or of a licence it shall not be lawful for the holder of a miner's right to mark out the land or any part of the land in respect of which such application is pending. [cf. 59 Vic. No. 40 (W.A.), sec. 41].

Amendment of section 71 of *Mines Act 1890.*

See *ib.* s. 13.

Pendency of application for lease defined.

50. For section seventy-one of the Principal Act there shall be substituted the following section, namely:—

71. The pendency of an application for a lease or licence shall begin with the marking out of the land by the applicant and shall continue until the Governor grants or refuses the same; provided that the pendency of any application for a lease or licence shall cease if before such grant or refusal the applicant does not proceed with his application and complete the same within such time as may be provided and limited by the regulations relating to mining leases or within such further reasonable time as may upon a written application be permitted in writing by the Minister, and a copy of such permission shall be posted up and kept so posted up on some conspicuous part of such land during the further pendency of such application. [cf. Regulations under 37 Vic. No. 13 (N.S.W.), cl. 29].

51. (1) No contract made before the commencement of this Act by any lessee under the *Mines Act* 1890 with any person to work in or upon or in connexion with the land demised as a tributer or upon the terms of retaining or being paid a portion of the gold or minerals or of the value of the gold or minerals in lieu of wages shall if such contract or a true copy thereof verified by affidavit has within fourteen days after the signing or execution of any such contract by the lessee and before the commencement of this Act been filed in the office of the mining registrar of the mining district wherein the land demised is situate, be deemed a breach of any covenant or condition in any lease under the *Mines Act* 1890 notwithstanding the absence of any sanction to assign.

Existing tribute agreements.
Comp. No. 1120,
s. 73.
See sec. 158.

(2) It shall not be lawful after the commencement of this Act to assign underlet or part with all or any of the land demised under any mining lease or to let a tribute in regard thereto without the sanction in writing of the Minister. Provided that nothing in this section contained shall prevent any *bond fide* mortgage charge or encumbrance in the ordinary way of business. But in all cases one general permission to let a tribute is sufficient for the term of twelve months.

Future tribute agreements.

52. If any lease of Crown lands granted under the authority of Part I of the Principal Act or of any Act authorizing the granting of leases of Crown lands for mining purposes be forfeited or determined by reason of any breach of covenants or conditions or otherwise any lease issued under or in pursuance of such forfeiture or determination shall be subject to all the rights then existing of any person mining on such land as a tributer or sub-tributer unless such forfeiture or determination has been occasioned by the act or default of such person either alone or jointly with others. Any tribute agreement which at the time of the forfeiture or determination of the lease existed between the lessee and the tributer shall in the event of a new lease being granted be deemed to continue between the new lessee and the tributer: Provided that such agreement shall not run during such period (if any) as the tributer is by reason of the forfeiture prevented from working his tribute, and the tribute agreement shall be deemed to be extended for such period beyond the time at which it would otherwise have terminated.

On forfeiture of mining lease of Crown land for breach of covenants tributer or sub-tributer entitled to a lease of forfeited land.

Ownership of
tailings after
lease
declared void.

53. (1) When any mining lease of any Crown land is surrendered or expires through effluxion of time or is declared void for breach of any covenant or condition, and the lessee thereof leaves upon the land comprised in such lease any tailings or other mining material and does not within twelve months from such surrender expiration or declaration of voidance or such longer period as the Minister may under special circumstances allow either remove or *bonâ fide* treat and afterwards continue to treat such tailings or other mine material then at the expiration of twelve months or further period as aforesaid such tailings or other mine material shall thereupon become the absolute property of the Crown. Provided that this sub-section shall not apply to any surrender made to obtain a new lease. Provided also that the Minister shall upon the written application of the said lessee fix a sum to be paid by the said lessee by way of rental for a period not exceeding five years for the surface of the land actually occupied by such tailings or other mine materials, and so long as the said lessee shall make due payment of the sum so fixed the preceding provisions of this section shall not apply.

(2) The Governor in the name and on behalf of Her Majesty may grant to any person or persons or corporation or corporations subject to the provisions of the Mines Acts and to the regulations made thereunder a licence or licences in respect of any such tailings or other mine material.

(3) Such licence or licences shall confer upon the licensee the right to remove such tailings or other mine material from or to treat the same upon the land on which such tailings or other mine material are or is situated.

(4) Notwithstanding the granting of any such licence the Governor may grant gold mining or mineral leases of the land on which such tailings or other mine material are or is situated as effectually as if such licence had not been granted subject only to the rights of the licensee under any such licence. [cf. 57 Vic. No. 24 (Tas.), Part VIII].

Lease to be
security for
money advanced
out of con-
solidated
revenue.

See No.
1251, s. 16.

54. Where any money has been or may be advanced out of the consolidated revenue upon security of any mining lease the Governor in Council may make it a condition that upon the renewal of such lease or upon a new mining lease being issued in respect of

such land, such lease and the land thereby demised and any future lease of such land shall be subject to the amount so advanced or so much thereof as may still be due and that the said renewed or new lease and the land thereby demised and any future lease of such land shall be a security for and charged with the payment of the said amount or so much thereof as may be unpaid.

55. Part VI of the *Instruments Act* 1890 shall not affect or apply to any mortgage bill of sale or other assurance made or given at any time whether before or after the passing of this Act to the Governor or to the Board of Land and Works or to any other person or persons or body as a trustee for Her Majesty as a security for money advanced out of the consolidated revenue upon the security of any machinery goods furniture fixtures or other personal chattels included in any such mortgage bill of sale or other assurance.

Instruments Act 1890
not to apply to security for money advanced out of consolidated revenue.
See No. 1251, s. 17.

56. (1) Every person who unlawfully removes or displaces any post erected to define boundaries and angles of any land applied for under any regulations under the Mines Acts relating to mining leases or water-right licences or held under any such lease or licence shall for every such offence be liable on conviction to a penalty not exceeding Ten pounds.

Penalty for unlawfully removing or displacing posts marking mining lease.
Ib. s. 15.

(2) The applicant for the lease or licence or the lessee or licensee or any person specially authorized in that behalf by the Minister may prosecute for any such offence.

57. (1) Notwithstanding anything in any Act contained it shall be lawful for the Governor in Council upon any application for a licence under section forty-two or section forty-nine of the *Land Act* 1890 and upon the applicant consenting to the condition hereinafter mentioned to issue such licence containing a condition that neither the applicant nor any person claiming through or under him shall be entitled to any compensation in respect of damage to be done to such land by mining operations therein or thereon or by the cutting or removing of any live or dead timber therefrom for mining purposes.

Conditional licence under section 42 of *Land Act* 1890.

(2) Where any licence is issued containing such condition any lease or Crown grant issued in pursuance thereof shall be and be deemed to be issued upon the same condition.

Certificate of
intention to
issue mining
lease or
licence.

See No. 1120, s. 69.

58. The Minister may after the expiration of fourteen days from the notice in the *Government Gazette* of the intention to issue any mining lease or licence issue to the applicant therefor a certificate under the hand of the Minister stating such determination, and such applicant may thereupon commence mining operations on the land in respect of which the certificate is issued.

Subdivision 7.—Mining Boards.

Powers and
duties of
Mining Board.
See No. 1120,
Part I, Div. 1 (10).

59. Every Mining Board in addition to all other powers and duties which exist by law shall have the following powers and duties, that is to say, to—

- a) advise and report to the Minister with respect to the codification of by-laws ;
- (b) inquire into and report to the Minister upon all applications for assistance from the Government towards searching for gold or minerals ;
- c) advise as to the localities in which searching by means of boring or otherwise in search of alluvial leads quartz reefs coal seams and other metalliferous or mineral deposits might be carried out ;
- (d) advise in regard to such applications for sale licensing or leasing of Crown lands under the Land Acts as may from time to time be remitted to the Board by the Minister ;
- e) make such proposals to the Minister as it may think advisable for the purpose of stimulating and encouraging mining and aiding in its development throughout Victoria ;
- (f) advise as to the exemption of auriferous areas from occupation under miners' rights and business licences ; and
- (g) generally advise as to any matters whatever connected with mining.

Qualifications
at mining board
elections in
respect of
business
licences.

60. Notwithstanding anything contained in section eighty-nine of the Principal Act no person shall be eligible for election as a member of a mining board by virtue of holding a business licence

unless he has held a business licence for and during the three months immediately preceding the last day appointed for the receiving of nominations of candidates ; and no person shall be entitled to vote at any election of a member of any mining board by virtue of holding a business licence unless he has held a business licence for and during the three months immediately preceding the day on which the poll commences.

Comp. No. 1120,
s. 90.

61. The persons nominating a candidate for election as a member of a mining board when forwarding to the office of the returning officer in writing the christian and surname of such candidate as required by section ninety-one of the Principal Act, shall state in writing on the nomination paper the number date and place of issue of the miner's right or business licence (as the case may be) of the candidate and each of the persons nominating such candidate, and shall also produce to the returning officer for his inspection each of the said miners' rights and business licences and also a copy of the newspaper in which the candidate's name shall have been published pursuant to the provisions of the said section.

Additional provisions re nomination of candidates for mining board.
See No. 1120,
s. 91.

62. No person being an uncertificated insolvent shall be capable of being elected a member of a mining board.

Uncertificated insolvent not to be elected on mining board.

63. Each member of a mining board shall by virtue of his office as such member and without any further or other appointment or authority than this Act be entitled to sit and act with any persons appointed by the Minister of Lands to hear and report upon applications under section one hundred and twenty-eight of the *Land Act* 1890 whenever such persons act within the mining division which he represents on the mining board. Provided that where more persons than one are members of the mining board for the same division only such one of the said persons shall be so entitled to sit as aforesaid as the mining board by resolution may nominate in that behalf. Provided also that the said member of the mining board shall not take any part in the proceedings or the deliberations recommendations or determination upon or with regard to any such application except so far as relates to the auriferous or mineral nature of the land applied for or the advisability of granting or refusing the application on grounds connected with mining.

Land Boards to include a member of mining board.

No. 1106, s. 128.

Subdivision 8.—Miscellaneous.

Regulations.
See No. 1120,
ss. 77, 78, 79.

64. In addition to the purposes for which regulations may be made under the Principal Act the Governor in Council may pursuant to the provisions of sections seventy-seven seventy-eight and seventy-nine of the Principal Act make regulations for all or any of the following purposes, namely :—

for regulating the transfer of the whole or any part of an interest in any application for a lease ;

for prescribing the period within which the lessee shall execute any lease granted under the provisions of the Mines Acts ;

and generally for carrying out and giving effect to the provisions of this Part.

Claims and leases may include several classes of land, &c.

65. Subject to the regulations and by-laws any claim may include both Crown land and private land and any claim or lease may include the private lands of several owners.

Amendment of section 226 of No. 1120.

66. For section two hundred and twenty-six of the Principal Act there shall be substituted the following section namely :—

Regulation of fees for proceedings before wardens.

226. It shall be lawful for the Governor in Council to make regulations prescribing what fees and sums of money shall be taken in proceedings before a warden and from time to time to lessen or increase the same. Such fees and sums of money shall be paid in the first instance by the person by whom or on whose behalf the act or proceeding in respect of which the same are payable is required to be done and shall in the discretion of the warden be deemed to be a part of the costs of the hearing. [cf. 62 Vic. No. 38 (N.Z.), sec. 278].

PART II.—MINING ON PRIVATE PROPERTY (a).

Subdivision 1.—Preliminary.

Interpretation.
See No. 1120,
s. 299.

67. In this Part if not inconsistent with the context or subject-matter—

(a) Cf. 57 Vic. No. 32 (N.S.W.); 60 Vic. No. 40 (N.S.W.); 62 Vic. No. 24 (Q.), Part VII, secs. 58-70; 51 & 52 Vic. No. 448 (S.A.); 58 & 59 Vic. No. 626 (S.A.); 62 Vic. No. 29 (W.A.); 63 Vic. No. 31 (W.A.); 62 Vic. No. 38 (N.Z.).

- “Applicant” includes any person to whom an interest in “Applicant.”
any application for a mining lease has been transferred
under the regulations.
- “Claim” means any private land occupied for the purpose “Claim.”
of seeking for gold or minerals therein by virtue of a
miner’s right under the by-laws of any mining district
and in accordance with the provisions of this Part :
- “Earth” includes any rock stone quartz clay sand and soil : “Earth.”
- “Gold” signifies as well any gold as any earth containing “Gold.”
gold or having gold mixed in the substance thereof or
set apart for the purpose of extracting gold therefrom :
- “Lease” means a lease granted pursuant to this Part : “Lease.”
- “Lessee” includes executor or administrator of a lessee or “Lessee.”
the transferee of a lessee with the consent of the
Governor in Council and includes any person to whom
an interest in a lease comes by operation of law :
- “Mineral” or “Minerals” means all minerals ores and “Minerals.”
metals other than gold :
- “Mining lease” means a lease from the Governor in Council “Mining lease.”
for mining purposes, namely, the searching for winning
working getting making merchantable carrying away or
disposing of mines and gold or minerals or purposes con-
nected therewith, and shall include a grant or licence
for mining purposes :
- “Mine” or “to mine” means to disturb remove cart away “Mine.”
wash sift smelt refine crush or otherwise to deal with “To mine.”
any earth by any mode or method whatsoever for the
purpose of obtaining gold or minerals therefrom :
- “Owner” includes— “Owner.”
- any person who is the owner or proprietor of land
alienated from the Crown for any estate in fee
simple at law or in equity, and
- any person who is the licensee or lessee of land under
any Act relating to Crown lands with the right of
acquiring the fee-simple thereof, and

any person who is the lessee or perpetual lessee from the Crown of any land known as the Mallee lands, and

any person who is the lessee of land leased for the cultivation of wattle trees under the provisions of the *Wattles Act* 1890, and

No. 1120, s. 299.

any person who is a trustee under the provisions of the *Agricultural Colleges Act* 1890, and

any person who is a mortgagee, and

all parties who being seised or possessed of and for the time being entitled to the receipt of the rents and profits of any private land or any estate or interest therein are under a disability to sell and convey the same. [cf. 51 & 52 Vic. No. 448 (S.A.), sec. 2].

“ Private land.”

“ Private land ” means—

Church lands.

(a) any land alienated from the Crown before the twenty-ninth day of December One thousand eight hundred and eighty-four for any estate in fee simple at law or in equity including all land which at the time of the commencement of the Act No. 391 had been granted by the Crown without receiving any purchase money or had been promised or reserved by the Crown or by the Governor in Council permanently or temporarily for church purposes or church and school purposes or dwelling-houses for the ministers of any denomination ; or

No. 1202, s. 2 (2).
No. 1251, s. 5 (b).

(b) any land alienated from the Crown in fee simple on or after the said date or leased or licensed before on or after the said date under any Act relating to Crown lands with the right of acquiring the fee-simple thereof ; or

Ib. s. 4.

(c) such lands as may either before on or after the first day of March One thousand eight hundred and ninety-two be leased from the Crown, namely, (1) land known as the Mallee Country ; and (2) lands leased for the cultivation of

wattle trees under the provisions of the *Wattles Act* 1890; or

- (d) any land vested in the trustees under the provisions of the *Agricultural Colleges Act* 1890 whether such land be or be not demised by the said trustees. [cf. 51 & 52 Vic. No. 448 (S.A.), sec. 2].

“Regulations” means regulations made pursuant to this Part :

“Sub-tributer” means any person who has with the consent of the lessee or owner of the mine made an agreement with a tributer of a mine or claim or portion of a mine or claim upon the terms of paying a portion or percentage of the gold or minerals or the value of the gold or minerals taken from such mine or claim to such tributer for the right to mine therein or thereon, and shall also mean any person who has made such an agreement with another sub-tributer :

“Tributer” means a person who works a mine or portion of a mine under an agreement with the lessee or owner of the mine or claim to pay such lessee or owner a portion or percentage of the gold or minerals or of the value of the gold or minerals taken from such mine or claim.

“Warden” means a warden of the gold-fields in and for Victoria or any portion thereof.

68. (1) Gold and silver whether on or below the surface of all land whatsoever in Victoria whether alienated or not alienated from the Crown, and if alienated whensoever alienated, are and shall be and remain the property of the Crown.

(2) All minerals mineral ores and metals other than gold and silver whether on or below the surface of all land in Victoria, not alienated in fee simple from the Crown on or before the 1st day of March One thousand eight hundred and ninety-two under the provisions of any Act are and shall be and remain the property

No. 1251, s. 18.

See No. 1120, s. 290.

See No. 1120, s. 290.

Ib. ss. 215, 209.

All gold and silver whatever and all minerals on lands not yet alienated to be and remain property of Crown.

See No. 1251, s. 3.

of the Crown, subject to the provisions of the Mines Acts, notwithstanding such land may at any time be alienated from, or leased or licensed by, the Crown.

Subdivision 2.—Grant of Leases of Private Land.

69. The Governor in Council may in the name and on behalf of Her Majesty subject to the provisions of this Part and to the regulations grant to any person a gold mining lease—

Gold mining leases on private land.
See No. 1120, s. 320.

Lands alienated before 29th December, 1884.
See No. 1120, s. 68.
No. 1514, s. 46.

(a) so far as relates to any land alienated from the Crown before the twenty-ninth day of December. One thousand eight hundred and eighty-four for any estate in fee simple at law or in equity such lease shall be effectual on or below or both on and below any such land for the purpose of mining therein or thereon for gold and for cutting and constructing thereon races drains dams reservoirs or tramways, and erecting any buildings and machinery and generally for doing all such acts and things as shall appear to be requisite for efficiently mining in or on the said land ; and

Land alienated licensed or leased on or after 29th December 1884.
See No. 1202, s. 2 (2).

(b) so far as relates to any land alienated from the Crown in fee simple on or after the said date, or licensed or leased before on or after the said date under any Act relating to Crown lands with the right of acquiring the fee-simple thereof, such lease shall give the holder thereof the right to enter upon and mine for gold and silver on or below or both on and below such land and to erect and occupy mining plant or machinery thereon in the same manner and under the same conditions and provisions as those under which persons have the right to mine for gold and silver in or on Crown lands ; and

Mallee wattles or Agricultural Colleges land.
See No. 1251, ss. 4 and 18.

(c) so far as relates to any land held under lease or perpetual lease from the Crown being land known as the Mallee Country, or any land leased for the cultivation of wattle trees under the provisions of the *Wattles Act* 1890, or any land vested in trustees appointed or continuing to act as trustees under the provisions of the *Agricultural Colleges Act* 1890, such lease shall give the holder thereof the right to enter upon such land and to mine on or

below or both on and below the same and to erect and occupy mining plant or machinery thereon or therein in the same manner and under the same conditions and provisions as those under which persons have the right to mine for gold on or below or both on and below Crown land, and such lease shall apply to land vested in trustees under the *Agricultural Colleges Act 1890* whether such land be or be not demised by such trustees; and

- (d) so far as regards any private land in the mining districts of Sandhurst Castlemaine or Ararat and on which any church or other place registered as a place of worship is situated such lease shall give the holder thereof the right to mine thereunder at a greater depth than four hundred feet from the lowest part of the surface, but no such lease shall be granted except for quartz mines. And no such lease shall give any right to mine within one hundred feet laterally of any such church except at a greater depth than four hundred feet from the surface. Such lease shall be freed and discharged from all liability on the part of the applicant to pay to the owners or trustees any purchase money or to obtain the consent of the owners or trustees thereto. [cf. 62 Vic. No. 29 (W.A.), sec. 5; 62 Vic. No. 24 (Q.), sec. 59 (3)].

70. The Governor in Council may in the name and on behalf of Her Majesty subject to the provisions of this Part and to the regulations grant to any person a mineral lease—

Mineral leases
on private land.
See No. 1251, s. 5.

- (a) so far as relates to any land alienated after the first day of March One thousand eight hundred and ninety-two from the Crown in fee simple or licensed or leased either before on or after such date under any Act relating to Crown lands with the right of acquiring the fee simple thereof, such lease shall give the holder thereof the right to enter upon such land and to mine on or below or both on and below the same for any mineral and to erect and occupy mining plant or machinery thereon in such manner and under such conditions and provisions as may be prescribed in such mineral lease; and

Land alienated
after 1st March
1892.

Mallee wattles
or Agricultural
Colleges lands.

See No. 1251,
s. 4.

- (b) so far as relates to any land held under lease or perpetual lease from the Crown being land known as the Mallee Country and land leased for the cultivation of wattle trees under the provisions of the *Wattles Act* 1890 or any land vested in trustees appointed or continuing to act as trustees under the provisions of the *Agricultural Colleges Act* 1890, such lease shall give the holder thereof the right to enter upon such land and to mine on or below or both on and below the same for any minerals and to erect and occupy mining plant or machinery thereon or therein in the same manner and under the same conditions and provisions as those under which persons have the right to mine for minerals on or below or both on and below Crown lands, and such lease shall apply to lands vested in trustees under the *Agricultural Colleges Act* 1890 whether such land be or be not demised by such trustees.

Gardens
orchards or
vineyards.

See No. 1120,
s. 327.

71. (1) No lease shall be granted of any mines under any private land used as a garden orchard or vineyard unless either—

- (a) the applicant has authority from the owner to enter thereon for the purpose of mining in or on the same; or
- (b) such lease is limited to a greater depth than one hundred feet from the lowest part of the surface. [cf. 62 Vic. No. 29 (W.A.), sec. 6; 62 Vic. No. 24 (Q.), sec. 59 (5)].

Limit of gardens
&c. exemption.

(2) No person shall be entitled to claim the benefit of the provisions of sub-section (1) of this section for more than ten acres of any land held by him as a garden orchard or vineyard.

Half acre city
town or borough
allotments.

See No. 1120,
s. 327, and No.
1189, ss. 2 and 3.

(3) No lease shall be granted of any mines under any private land being of less extent in area than half-an-acre in any city town or borough unless either—

- (a) the applicant has authority from the owner to enter thereon for the purpose of mining in or on the same; or
- (b) such lease is limited to a greater depth than four hundred feet from the lowest part of the surface. [cf. 51 & 52 Vic. No. 448 (S.A.), sec. 3.

(4) No lease shall be granted of any mines under any private land on which any hospital asylum or public building is situated or under or within one hundred and fifty yards laterally of any cemetery or any natural reservoir or any waterworks unless either—

As to leases under hospitals churches public buildings cemeteries &c.
See No. 1120, s. 320.

(a) the consent in writing of the owners or trustees of such land in such case has been first obtained ; or

(b) such lease is limited to a greater depth than four hundred feet from the lowest part of the surface.

See No. 1189, ss. 2 and 3.

(5) Except in the mining districts of Sandhurst Castlemaine and Ararat no lease shall be granted of any mines nor shall any mining operations be carried on under any private land on which any church or other place registered as a place of worship is situated nor within one hundred yards laterally of any such church or registered place of worship, nor shall it be competent for any person to mark out or occupy such private land by virtue of a miner's right. This sub-section shall not however be deemed to affect any lease or claim granted or held before the commencement of this Act. Provided that this sub-section shall not apply to any lease granted with the consent in writing of the owners or trustees of the land on which any church or other place registered as a place of worship is situated, and also with the consent in writing of the head or authorized representative of the denomination to which such church or place of worship belongs.

As to mining under churches.
See No. 1120, s. 320.

(6) No lease shall be granted of any mines under or within one hundred yards laterally of any private land on which any spring dam sheep-wash or woolshed in *bonâ fide* use or occupation, dwelling-house outhouse building or manufactory is situated unless—

Limitation on the leasing of springs reservoirs woolsheds dwelling-houses &c.
See *ib.* s. 327.

(a) the applicant has authority from the owner to enter thereon for the purpose of mining in or on the same ; or

(b) the land applied for and the whole of the land belonging to the owner of the land applied for within one hundred yards laterally of such spring dam sheep-wash or woolshed dwelling-house outhouse building or manufactory and a right of access shall have first been taken by the applicant which he is hereby authorized to do, and the amount

of the purchase money thereof ascertained in the same manner as purchase money is ascertained under the provisions of this Part ; or

See No. 1189, ss. 2 and 3.

- (c) such lease is limited to a greater depth than four hundred feet from the lowest part of the surface.

See ib. s. 7.

(7) No lease shall be granted of any mines under any lake or artificial reservoir except with the consent of the owner or trustees of the land nor within such distance of such lake or artificial reservoir as the Minister may determine.

Compensation. See ib. ss. 2 and 4.

72. (1) Where pursuant to the provisions of this Part a lease is applied for of mines at a greater depth than one hundred feet or four hundred feet (as the case may be) without the consent of the owner or trustees the applicant shall pay to the owner or the owner and occupier or trustees such compensation as may be ascertained under the provisions of this Part ; and before any lease of such land is granted the applicant shall prove to the satisfaction of the warden—

Conditions on which such leases may be granted. See ib. s. 4 (1).

- (a) that he is the owner of the land included in the application or that he possesses a claim or lease for mining purposes either adjoining the land applied for or a claim or lease with such way-leaves and other rights through intermediate lands as will enable him to mine upon the land applied for without any occupation of or interference with the overlying strata, or that such claim or lease is being worked by such shafts adits or tunnels as will enable him to mine on the land applied for without such occupation or interference, and

See No. 1189, s. 4 (2).

- (b) that such working can be carried on in the usual course of skilled mining without appreciable damage to the surface or the upper strata of the land applied for or any building erection or other work whether public or private existing thereon.

- (c) Before such proof shall be given ten clear days' notice in writing of the time and place appointed by the warden for the hearing shall be given by the applicant to the owner and occupier or trustees. If the owner or trustees

be dead or cannot be found notice may be given by advertisement or otherwise as the warden shall direct.

(2) Owners occupiers and trustees of land under which mining has been authorized by a lease shall be entitled if authorized in writing by the warden to inspect and survey the underground workings from time to time as in the opinion of the warden may be deemed necessary. Every such owner occupier and trustee shall before entering inspecting or surveying any of the underground workings make a declaration before the warden (who is hereby authorized to take the same) that he the said owner occupier and trustee will not (except so far as may be necessary to protect or enforce his rights or except as a witness in a court of justice) without the consent in writing of the lessee divulge or cause to be divulged to any person whomsoever any information obtained upon or by such entry inspection or survey, and every such owner occupier or trustee who shall act contrary to such declaration shall forfeit and pay any sum not exceeding Fifty pounds.

Owners of land may inspect underground workings of mine thereunder. No. 1189, s. 4.

(3) Nothing in this or the next preceding section shall be deemed to apply to vary or affect any agreement or contract entered into within the mining district of Sandhurst before the nineteenth day of December One thousand eight hundred and ninety or within the mining districts of Castlemaine or Ararat before the Twenty-third day of December One thousand eight hundred and ninety-two. [cf. 62 Vic No. 29 (W.A.), sec. 7 ; 62 Vic. No. 24 (Q.), sec. 59 (9)].

Certain contracts not affected. No. 1189, ss. 7 and 8, and No. 1281, s. 1.

Subdivision 3.—Entry Upon and Marking Out Private Land.

73. (1) (a) Any holder of a miner's right who desires to obtain pursuant to the provisions of this Part possession of as a claim, or

Mode of obtaining possession or lease of certain land.

(b) any person who desires to obtain pursuant to the provisions of this Part a lease of,

See No. 1202, s. 4 (1). See sec. 65.

any private land may at all reasonable times and doing no unnecessary damage enter upon any part of such land for the purpose of marking out any portion thereof which he may desire to take possession of by virtue of such miner's right or under the regulations. [cf. 62 Vic. No. 29 (W.A.), sec. 8 ; 62 Vic. No. 24 (Q.), sec. 59].

No. 1202,
s. 4 (2).

(2) For the purpose of marking out or otherwise complying with the by-laws of the mining district in which such land is situate or with the said regulations such land shall be deemed to be Crown land.

Ib. s. 4 (3).

(3) No such entry or marking out shall be or be deemed to be an act of trespass on the part of such person his servants or agents.

Certain land not
to be entered
&c. without
consent of
owner.
See ib. s. 5.

(4) No such holder or person shall be entitled to enter for the purpose of marking out any private land used as a garden orchard or vineyard or on which is situated any spring lake artificial reservoir dam sheep-wash or woolshed in *bonâ fide* occupation or any dwelling-house outhouse or manufactory or of any land within one hundred yards of the same unless with the written consent of the owner thereof. [cf. 63 Vic. No. 43 (W.A.), sec. 8].

(5) No private land mentioned in section seventy-one shall be taken possession of under a miner's right except by or with the consent of the owner and as to private land mentioned in subsection (5) of section seventy-one except with the consent of the head or authorized representative of the denomination to which such land belongs.

(6) Notwithstanding anything hereinbefore in this section provided, no such holder or person shall be entitled to enter for the purpose of marking out any part of any private land as defined by section sixty-seven (a) unless he has first obtained from the warden the mining registrar or a justice of the peace a written authority so to do. Such authority may be granted on receiving from such holder or person a statutory declaration to the effect that he believes the land to be auriferous and gives his reasons for such belief and such holder or person shall whenever required so to do produce such written authority to the owner and occupier of such private land or their agent. The application may be made to the warden registrar or justice personally or in writing through the post, and the warden registrar or justice may if satisfied of the *bonâ fides* of such application and if he thinks fit without reference to the owner or occupier of the land required to be entered upon grant authority in writing to enter and mark out as aforesaid within a time limited by him.

74. So far as regards any private land in respect to which compensation is payable as hereinafter provided—

Compensation to be paid or agreed upon before mining.
See No. 1202, s. 6.

- (a) the holding of a miner's right by any person, or
- (b) the granting of a lease to any person

shall not confer upon such person any right of entry upon such land for the purpose of mining or making preparations for mining, unless and until such person shall either have paid or tendered to the owner or the owner and occupier of such land the amount of compensation determined as in this Act provided or have paid or tendered to the owner the purchase money of land taken under the provisions of this Part or have entered into an agreement in writing with such owner or owner and occupier as to such compensation and the payment thereof and such payment tender or agreement shall have been certified on the lease or on the registration of the claim by the owner and occupier or trustees or by the Minister or warden; or in case no compensation is payable the same shall have been certified in manner aforesaid. If the owner or trustees be dead or cannot be found such payment may be made to the Minister in trust for the owner or trustees. [cf. 62 Vic. No. 29 (W.A.), sec. 9].

Subdivision 4.—Purchase Money or Compensation payable to Owner or Occupier of Private Land.

75. (1) Any person being the holder of a miner's right or an applicant for a lease may treat and agree with the owner or with the owner and occupier respectively of any private land—

Power to agree to amount of purchase money or compensation.
See No. 1120, s. 308.
See sec. 90.

- (a) as to the amount of purchase money of the land proposed to be taken by such holder or applicant; or
- (b) as to the amount of compensation which by this Act it is declared shall be made to the owner or owner and occupier by a person who desires to mine on the land.

(2) No such agreement shall have any force or validity at law or in equity unless the same is in writing and signed by the parties thereto. [cf. 62 Vic. No. 29 (W.A.), sec. 10; 51 & 52 Vic. No. 448 (S.A.), sec. 23].

76. (1) Where the person who desires to mine is the holder of a miner's right or an applicant for a gold mining lease it is hereby

Measure of compensation to be paid or agreed upon before mining.
See No. 1120, s. 308.
See sec. 90.

declared that the compensation to be made to the owner or to the owner and occupier aforesaid shall be—

Land alienated before 29th December 1884.
See No. 1120, s. 308.

(a) Compensation for being deprived of the possession of the surface or of any part of the surface of private land as defined by section sixty-seven (a), and for damage to the surface of the whole or any part thereof as the case may be which may arise from the carrying on of mining operations therein or thereon, and for the expense of severing such land or any part thereof from other land of the owner or occupier and for all consequential damages, and the right to compensation in respect of any such damage shall not be abridged or in anywise affected by reason that such damage would not be the subject of an action at law ; or

Land alienated on or after 29 December 1884.
No. 1202, s. 2 (2).

(b) Compensation for surface damage to be done to private land as defined by section sixty-seven (b) by reason of mining thereon ; or

Mallee lands and wattle lands.
No. 1251, s. 4 (2).

(c) Compensation for surface damage to be done to any improvements upon private land as defined by section sixty-seven (c) by reason of mining thereon ; or

Agricultural Colleges lands.
Ib. s. 18.

(d) Compensation for surface damage to be done to private land as defined by section sixty-seven (d) being fenced and cultivated land by reason of mining thereon.

Measure of compensation by applicant for a mineral lease.

(2) Where the person who desires to mine is the applicant for a mineral lease the compensation to be made to the owner or to the owner and occupier aforesaid shall be—

Mallee lands and wattle lands.
No. 1251, s. 4 (2).

(a) Compensation for surface damage to be done to any improvements upon private land as defined by section sixty-seven (c) by reason of mining thereon ; or

Land alienated after 1st March 1892.
Ib. s. 5 (b).

(b) Compensation for surface damage to be done by reason of mining thereon to land alienated after the first day of March One thousand eight hundred and ninety-two from the Crown in fee simple or leased or licensed either before on or after such date ; or

Agricultural Colleges lands.
No. 1281, s. 18.

(c) Compensation for surface damage to be done to private land as defined by section sixty-seven (d) being fenced and cultivated land by reason of mining thereon.

(3) Such compensation shall be paid to the owner or owner and occupier of such land. [cf. 62 Vic. No. 29 (W.A.), sec. 11 ; 51 & 52 Vic. No. 448 (S.A.), sec. 23].

Compensation to be paid.

77. (1) (a) If within twenty-one days after the marking out of any land as aforesaid by the holder of a miner's right,
or
(b) if within ten days after the completion of the survey of the land and the posting of the notice by the mining surveyor as provided by the regulations,

Where no agreement warden to determine compensation.

See No. 1202, s. 7 (1).

the holder of a miner's right or the applicant for a lease as the case may be and the owner or the owner and occupier of the land be unable to agree upon the amount of compensation or purchase money (as the case may be) to be paid then on the complaint of any party the warden may hear such complaint and determine the amount of compensation or purchase money to be paid by the holder of the miner's right or the applicant for the lease. [cf. 62 Vic. No. 24 (Q.), secs. 60-61 ; 62 Vic. No. 29 (W.A.), sec. 12 ; 51 & 52 Vic. No. 448 (S.A.), sec. 23].

(2) In determining the amount of such compensation the warden shall take into consideration the amount of any compensation which the owner or owner and occupier has or have already received for or in respect of the damage for which compensation is being assessed and shall deduct the amount already so received from the amount which the owner or the owner and occupier would otherwise be entitled to for such damage.

(3) Every such complaint shall be deemed to be a proceeding within the meaning of section two hundred and nineteen of the Principal Act, and for the purposes of enabling wardens to hear determine and enforce such complaints and of enabling appeals to be made from their decisions all the provisions of Part I of the Principal Act applying to proceedings under such section shall equally apply to such complaint so far as the same may be applicable.

See ib. s. 7 (2).

(4) The warden shall forthwith forward to the Minister a copy of every complaint as aforesaid by or against a holder of a miner's right or an applicant for a lease and of his decision thereupon.

See ib. s. 7 (3).

(5) Any application for a lease or marking out for a lease or as a claim may be abandoned at any time by the applicant giving notice thereof in writing to the Minister (by leaving the same with the warden) and to the owner and occupier the applicant or claim-holder also paying to the owner and occupier such costs as the warden shall allow.

Before lease issued purchase money or compensation to be paid or owner to consent.

No. 1202, s. 8.

78. Before any lease of private land is issued to any person other than the owner of such land the Minister shall be satisfied that the following provisions have been complied with :—

- (a) where the amount of purchase money or compensation has been determined by the warden that such amount has been paid or tendered to the owner or owner and occupier or that such owner or owner and occupier has or have consented in writing to the issue of the lease without such payment ;
- (b) where the parties have agreed in writing as hereinbefore provided that the agreement has been executed in triplicate and one original part thereof forwarded to the Minister, and that any amount agreed to be paid before issue of the lease has been paid or tendered or such payment before issue has been waived in writing by the party entitled thereto. [cf. 62 Vic. No. 29 (W.A.), sec. 13 ; 62 Vic. No. 24 (Q.), sec. 60].

Lessee may obtain more surface area.

79. (1) If after the granting of any lease or the commencement of work on any claim marked out under this Part the lessee or holder of a miner's right desire to occupy any portion of the surface of the land comprised in such lease or claim in addition to the surface area which he is already entitled so to occupy and if within twenty-one days after notice in writing to the owner or owner and occupier by such lessee or holder of his desire, no agreement in writing be made as to the amount of compensation or purchase money (as the case may be) to be paid therefor, then on the complaint of any party the warden may subject to the provisions of this Part determine the amount of compensation or purchase money to be paid.

(2) The provisions of sub-sections (2) and (3) and (4) of the last but one preceding section of this Act shall apply to proceed-

ings under this section. [cf. 62 Vic. No. 29 (W.A.), sec. 14; 62 Vic. No. 24 (Q.), sec. 59 (8)].

80. The determination by a warden pursuant to this Act of the amount of compensation for surface damage payable to any person shall be deemed and taken to be a sufficient compliance with any covenant or condition in any Crown grant lease or licence to the effect that compensation for surface damage shall be determined as provided by section one hundred and twenty-one of the *Land Act* 1890 or section one hundred and seventeen of *The Land Act* 1884 (as the case may be).

Effect on covenants of determination of compensation by warden.
No. 1202, s. 9.

81. (1) Every application for a lease shall be in accordance with the regulations, but any lease may be granted notwithstanding that the person applying for the same may not in all respects have complied with the said regulations.

Application for lease to be pursuant to regulations.
See No. 1120, s. 306.
Ib. s. 320.

(2) Nothing in the Mines Acts contained shall be construed as rendering it obligatory to grant any lease or licence to any person applying for the same, notwithstanding that he may have complied with the enactments and regulations in force and applicable thereto; but if his application be refused he shall be informed of the reason for such refusal. [cf. 62 Vic. No. 29 (W.A.), sec 15].

Not obligatory to grant lease.
See ib. s. 67.

82. No mining lease shall be granted under this Part until after the expiration of seven days from the date of notification in the *Government Gazette* of intention to grant the same and in some newspaper the place of publication of which is near to the land sought to be leased. [cf. 62 Vic. No. 29 (W.A.), sec. 16].

Notice of intention to grant mining lease to be published in *Government Gazette*.
Ib. s. 321.

83. Every lease granted under the authority of this Part shall contain a condition that if the lessee fail at any time during the term to fulfil the conditions and terms therein contained or to use the land *bonâ fide* for the purposes for which it is demised such lease shall for any such failure be voidable at the will of the Governor in Council. [62 Vic. No. 29 (W.A.), sec. 17].

Leases to contain conditions re non-fulfilment of covenants.
Ib. s. 322.
See sec. 101.

84. (1) The term for which a mining lease may be granted under this Part shall be for a term not exceeding fifteen years from the time of granting the same.

Term and rent of lease.
See ib. s. 322.

(2) In the case of a mineral lease the extent of the area shall not exceed six hundred and forty acres.

See No. 1120,
s. 322.

(3) The yearly rent to be payable in respect of such leases shall be at the following rates for every acre and portion of an acre demised, namely—

- (a) for land alienated from the Crown before the twenty-ninth day of December One thousand eight hundred and eighty-four for any estate in fee simple at law or in equity—for gold mining leases Sixpence ;
- (b) for land alienated from the Crown in fee simple on or after such date or licensed or leased before on or after such date under any Act relating to Crown lands with the right of acquiring the fee-simple thereof—for gold mining leases Two shillings and sixpence and for mineral leases not exceeding One pound ;
- (c) for land either before on or after the first day of March One thousand eight hundred and ninety-two leased from the Crown, namely (1) lands known as the Mallee Country and (2) lands leased for the cultivation of wattle trees under the provisions of the *Wattles Act* 1890—for gold mining leases Two shillings and sixpence and for mineral leases not exceeding One pound ; and
- (d) for land vested in the trustees appointed or continuing to act as trustees under the provisions of the *Agricultural Colleges Act* 1890—for gold mining leases Two shillings and sixpence. [cf. 62 Vic. No. 29 (W.A.), sec. 18 ; 62 Vic. No. 24 (Q.), sec. 59 (3) ; 51 & 52 Vic. No. 448 (S.A.), sec. 23 (ii), (iii)].

Rent reserved in
existing leases
under Act No.
796 reduced.
Ib. s. 323.

85. In the case of every mining lease and lease under *The Mining on Private Property Act* 1884 made or issued previously to the eighteenth day of December One thousand eight hundred and eighty-five by the Governor in Council the rent reserved shall from and after the said date be deemed to be at the rate of Sixpence for every acre demised ; and every such mining lease and lease shall so far only as regards any rent accruing due after the

said date be read as if rent at the rate of Sixpence for every acre had been thereby reserved in lieu of the rent therein mentioned.

86. The rent reserved by or payable under any lease issued either before or after the commencement of this Act under *The Mining on Private Property Act 1884* or Part II of the Principal Act or this Part of this Act shall not be less than Ten shillings per annum except in cases in which a smaller sum was payable before the passing of *The Mining Rents Act 1887*, in which cases such smaller sum shall continue to be payable.

Minimum rents to be Ten shillings per annum.
See 1120, s. 324.

87. Where the rent reserved by or payable under any mining lease made or issued under *The Mining on Private Property Act 1884* by the Governor in Council before the passing of *The Mining Rents Act 1887* would but for the provisions of section three of *The Mining Act 1885* have been less than the sum of Four pounds per annum, such mining lease shall so far as regards any rent accruing due after the passing of this Act be read as though this and the last preceding section had been in force at the time of the making or issuing of such lease.

Provision where rents have been fixed in leases issued before passing of *The Mining Rents Act 1887* under provisions as to minimum in Act No. 861.
See ib. s. 325.

88. Every mining lease under this Part of this Act may with the consent of the Governor in Council be at any time surrendered. [cf. 62 Vic. No. 29 (W.A.), sec. 19].

Mining lease may be surrendered.
Ib. s. 334.

89. When any land is occupied under the provisions of this Part of this Act as a claim the same shall be worked in accordance with the by-laws for the mining district in which the same is situated, and shall be subject to the provisions of the Mines Acts and such by-laws in like manner as if the same were Crown lands held under the by-laws for such district. [cf. 62 Vic. No. 29 (W.A.), sec. 20].

Private land occupied as a claim subject to Act and by-laws.
Comp. No. 1189, s. 11.

90. The holder of a miner's right who occupies private land as a claim under the provisions of this Part shall if any agreement has been entered into by him with the owner or the owner and occupier of such land for the payment of purchase money or compensation as herein provided file a copy of such agreement with the mining registrar at the time when he makes application for the registration of such land as a claim; and until such agreement be so filed it shall have no force or validity at law or in equity. For the filing of such agreement no fee shall be charged. [cf. 62 Vic. No. 29 (W.A.), sec. 21].

Copy of agreement as to purchase money or compensation to be filed with mining registrar otherwise void.
See sec. 74.

Owner of mine
entitled to
purchase
freehold.

See No. 1189, s.
9.

91. (1) The holder of any claim or lease shall be entitled to take for mining purposes the whole of any private land belonging to one owner within the boundaries of or adjoining or abutting on such claim or lease and within any city town or borough on payment of the amount of purchase money therefor which shall be ascertained by agreement in writing or in default of agreement in the same manner as purchase money is to be ascertained under the provisions of this Part.

How purchase
money to be
paid

See *ib.* s. 10.

(2) When such purchase money is ascertained on complaint to a warden the said holder of such claim or lease shall pay it to the warden's clerk or as the warden shall order and shall thereupon be entitled to possession of the said private land, and the owner of the same shall forthwith execute to the holder of such claim or lease all necessary conveyances transfers and assurances, and in the event of such holder failing to comply with such order execution may be issued by the warden for the amount of such purchase money or compensation on the application by or on behalf of the person entitled thereto.

(3) A mining lease in respect of such land may be issued to the holder of the said claim or lease upon proof of transfer to him of such land.

(4) This section shall not apply to any private land on which any church is situated. [cf. 62 Vic. No. 29 (W.A.), sec. 22].

Parties under
disability or
having limited
interest enable
to sell or convey
and exercise
other powers.

See No. 1120, s.
316.

92. (1) All parties under disability to sell and convey who are seised or possessed of or entitled to any private land or any estate or interest therein may subject to the provisions of this Part settle by agreement with any person desiring to mine therein or thereon under a miner's right or a mining lease the amount of compensation to be paid in respect of any such land estate or interest as provided in this Part.

See *ib.* s. 316.

(2) Such parties may enter into all necessary agreements for that purpose, and particularly any of the following parties so seised possessed or entitled as aforesaid may so settle with the holder of a miner's right or the applicant for a mining lease (that is to say):—All corporations tenants in tail or for life guardians committees of lunatics and idiots trustees or feoffees in trust for charitable or other purposes executors and administrators, and all

parties for the time being entitled to the receipt of the rents and profits of any such land in possession or subject to any estate in dower or to any lease for life or for lives and years or for years or any less interest, and every valuation so settled as aforesaid by all such parties other than lessees for life or for lives and years or for years or for any less interest shall be binding not only on themselves and their respective heirs executors administrators and successors but also on every person entitled in reversion remainder or expectancy after them or in defeasance of the estates of such parties and as to such guardians on their wards and as to such committees on the lunatics and idiots of whom they are the committees respectively, and as to such trustees executors or administrators or their cestuique trusts whether infants issue unborn lunatics *femes covertes* or other persons. [cf. 62 Vic. No. 29 (W.A.), sec. 23].

93. The owner of any private land may if a lease of such land have not previously been applied for make application in accordance with this Part and the regulations and shall have priority in respect of such application for a lease of such land but shall not in respect of such application be subject to the provisions of this Part relating to compensation. [cf. 62 Vic. No. 29 (W.A.), sec. 24; 57 Vic. No. 32 (N.S.W.), sec. 25; 62 Vic. No. 24 (Q.), sec. 64; 51 & 52 Vic. No. 448 (S.A.), sec. 22].

Owner may apply for lease.
See No. 1120, s. 305.

94. If mining operations have not been commenced during the twelve months following the issue of a lease or if after mining operations have been commenced in or upon any private land held under a lease granted under this Part or the corresponding provisions of any enactment hereby repealed the same have wholly ceased without the consent of the Governor in Council, it shall be lawful for the Governor in Council if he shall think fit on the application of the owner of the land to authorize him to re-enter and take possession of such land notwithstanding that such lease may not have expired. [cf. 62 Vic. No. 29 (W.A.), sec. 25].

Re-entry by owner
See *ib.* s. 333.

Subdivision 5.—Prospecting Area on Private Land.

95. (1) Any person being an applicant for a lease of any private land under this Part and being desirous of testing such land may in his application apply for a prospecting area of such

Lease of prospecting area and reserved area of private land.

land not exceeding five acres for quartz mining purposes and ten acres for alluvial mining purposes together with a reserved area of the remainder of the private land applied for by him.

(2) The Governor in Council or any person authorized by him in that behalf may subject to this Part and to the regulations grant a licence to occupy and to prospect any part of the land applied for as a prospecting area and for a time not exceeding twelve months and may renew such licence for a further period of twelve months.

(3) The application for a prospecting area and reserved area shall be made and be dealt with in accordance with the regulations.

(4) The amount of compensation for the whole area shall be ascertained as provided for in this Part with reference to mining leases so far as the provisions hereof can be made applicable, and the compensation in respect of the prospecting area and the reserved area respectively shall be separately stated.

(5) No such licence shall be granted unless and until the compensation in respect of the prospecting area has been paid to the owner or owner and occupier of the land or he or they has or have consented in writing to the issue of the licence without such payment.

(6) On the granting of such licence the reserved area shall not be occupied for mining during the currency of such licence or of a renewal thereof or during the pendency of the application for a lease of the reserved area.

(7) If the applicant considers the land applied for is not sufficiently tested by the prospecting work done under such licence the prospecting area held thereunder may be surrendered by him and he may apply for a further prospecting area not exceeding ten acres of the reserved area, and the amount of compensation for such further prospecting area shall be ascertained as aforesaid and a licence to occupy and to prospect such further area may be granted in the manner and for the period and under the conditions hereinbefore provided, and successive areas may in like manner be applied for granted or surrendered until the land

is sufficiently tested or the lease applied for be granted of the reserved area or any part thereof.

(8) If the holder of such licence do not comply with its conditions the licence may be cancelled by the Governor in Council.

(9) (a) If the applicant desires to surrender his licence during the currency thereof and to obtain a lease of the reserved area he shall give notice of such desire to the Minister, or

(b) If the Minister is of opinion that the land has been sufficiently tested he may require the applicant to surrender his licence and proceed with his application for a lease, and if such applicant fails or neglects to do so

such licence may be cancelled by the Governor in Council and such application shall be deemed to be abandoned and be dealt with accordingly under the regulations.

(10) If the Minister is satisfied that the applicant has complied sufficiently with the conditions of any licence granted to him and has as to such application otherwise complied with the provisions of this Part, a lease of the land or of any part of it may be granted to him.

(11) The term of any lease granted under the provisions of this subdivision may be for any term not exceeding fifteen years from the date on which the last licence was issued or renewed in respect of such land. [cf. 62 Vic. No. 29 (W.A.), sec. 27].

Subdivision 6.—Jurisdiction.

96. After the granting of any lease under the provisions of this Part or the corresponding provisions of any enactment here-
Jurisdiction. See No. 1120, s. 336.
 by repealed or after the occupation by a holder of a miner's right under the by-laws of any mining district of any private land the jurisdiction of the warden and of the Court of Mines and every other jurisdiction established or continued by Part I of the Principal Act with respect to mining on Crown lands shall apply to any private land comprised in such lease or to land occupied by such holder of a miner's right as the case may be and to mining in any land in which such mining is authorized by such lease or

by virtue of a miner's right, and sections one hundred and five to one hundred and eight both inclusive of the *Crimes Act* 1890 shall apply to mining under this Part; and the word "claim" in the said sections one hundred and five one hundred and six and one hundred and eight shall mean and include private land in respect of which a lease has been granted under this Part or occupied by any holder of a miner's right under the provisions of this Part as aforesaid. [cf. 62 Vic. No. 29 (W.A.), sec. 28].

Subdivision 7.—Renewal of Lease and Pendency of Application.

Renewal of
lease.

See No. 1120,
s. 326.

97. (1) The person beneficially interested and entitled under any lease granted in pursuance of this Part or under the corresponding provisions of any enactment hereby repealed to mine in or on the land the subject of such lease shall if he make application before the expiration of such lease be entitled to and it shall be lawful for the Governor in Council to grant a renewal of his lease of the whole or of any part of the private land comprised therein for a term of fifteen years and without payment of any compensation, other than compensation to the owner or owner and occupier of land comprised in section seventy-six (a) for depriving him of the possession of the surface of such land or any part thereof and for any injury or damage which it may reasonably be supposed will be done to the surface beyond that already done and which has not been already compensated for under any previous agreement or proceedings in any court of mines or before any warden or of private land as defined in section sixty-seven (b) (c) and (d) for surface damage and which has not been already compensated for under any previous agreement or proceeding before a warden; and if the amount of such compensation be not ascertained by agreement between the owner or the owner and occupier and the person entitled to such lease before the expiration of one month after the date of such application it shall be determined in the same manner as in the case of an original lease.

Right to renewal
of transferee
and transferee
of portion of
a mining lease.
See No. 1384,
s. 6.

(2) Where a portion of the land included in any lease granted under the provisions of this Part or the corresponding provisions of any enactment hereby repealed has been or is transferred by the proprietor of such lease to any other person or company any transferee who holds under the *Transfer of Land Act* 1890 a leasehold certificate of title in respect of the portion so transferred

shall be entitled to obtain a renewal of a lease pursuant to the provisions of this Part so far as regards the portion transferred, and the registered proprietor of a lease of the land not so transferred shall be entitled to a renewal of such lease pursuant to the said provisions. [cf. 62 Vic. No. 29 (W.A.), sec. 29].

98. (1) Pending any application for a lease or renewal of a lease under the provisions of this Part it shall not be lawful to mark out as a claim or include within the boundaries of any claim the land applied for or any part thereof, and no such marking out shall confer any right or title to the said land ; and if any person who not having previously been in lawful occupation of such land shall at any time thereafter until and unless the application for the lease or the renewal of a lease shall be refused enter upon occupy or in any way interfere with such land, such entry occupation or interference shall be deemed a case of trespass or encroachment within the jurisdiction of the wardens appointed under Part I of the Principal Act.

Ground applied for under gold mining lease protected pending application. See No. 1120, s. 70.

See ib. s. 65.

(2) Such applicant may proceed therefor and for any damages in respect of such trespass or encroachment and for the recovery of any gold or any minerals taken by such person out of such land or of the value thereof before a warden in manner in Part I of the Principal Act provided for proceedings before wardens in cases of trespass or encroachment.

(3) Notwithstanding any decision of a warden the applicant shall not be entitled to have delivered to him any such gold or minerals or to receive payment of or to levy the amount of the value thereof or of any damages assessed and awarded to him until it shall have been decided to grant his application for the lease, but such gold or minerals or the value of the same or such amount of damages shall until the matter of such application shall be determined be lodged with the clerk of the warden, and if determined in favour of the applicant shall be delivered or paid to him and if otherwise to the person from whom the same shall have been recovered. [cf. 62 Vic. No. 29 (W.A.), sec. 30].

See ib. s. 65.

99. (1) The pendency of an application for a lease shall begin with the marking out of private land for a lease, and shall continue until the Governor in Council shall grant or refuse the same.

Pendency of application defined. See No. 1384, s. 4.

(2) The pendency of any application for a lease shall cease if the applicant do not proceed with his application and complete his application within such time as may be fixed by the regulations or within such further reasonable time as may upon a written application be permitted in writing by the Minister, and a copy of such permission shall be posted and kept so posted upon some conspicuous part of such land during the further pendency of such application.

(3) In no case shall such pendency continue beyond six months after either the posting of the notice by the mining surveyor as provided by the regulations or the fixing of compensation by the warden or the decision of the Supreme Court on any appeal on case stated in reference to the said application whichever period shall last expire.

(4) During the pendency of any application as aforesaid it shall not be lawful for the owner of any such private land to enter into any agreement with the holders of miners' rights under the provisions of this Part. Every agreement entered into contrary to the foregoing provisions of this section shall be null and void. [cf. 62 Vic. No. 29 (W.A.), sec. 31].

Lease to
continue in
operation
during pendency
of application
for renewal.

100. The pendency of any application for the renewal of a lease shall begin with the receipt of such application by the Minister and shall continue until the Governor in Council grants or refuses the same. During the pendency of any application for the renewal of a lease of private lands under the provisions of this Act—

See No. 1384,
s. 2.

(a) it shall not be lawful for the owner of any such private lands to enter into any agreement with the holders of miners' rights under the provisions of this Part. Every agreement entered into contrary to the foregoing provisions of this section shall be null and void ; and

See *ib.* s. 3.

(b) any lease the renewal of which is the subject of the application (whether made before or after the commencement of this Act) shall notwithstanding anything to the contrary in such lease continue in full force and effect during the pendency of such application for a renewal. [cf. 62 Vic. No. 29 (W.A.), sec. 32].

Subdivision 8.—Breach of Labour Covenant.

101. (1) If the lessee of any mining lease in respect of any private land commits a breach of the labour covenant of such lease it shall be lawful for any holder of a miner's right to apply to the Minister in the form set out in the Second Schedule to this Act or to the like effect.

Where breach of labour covenant of lease, holder of miner's right may apply for inquiry.
Second Schedule.
See sec. 53.

(2) If such application be made and the person or persons so applying lodges with or forwards to the clerk of the warden the sum of Five pounds for costs, the Minister may if he thinks fit refer the said application to the warden with directions to hold a public inquiry concerning the alleged breach.

(3) All the provisions of Subdivision 4 of Part I relating to an application for a public inquiry concerning an alleged breach of the labour covenant of a mining lease of Crown lands and to the powers of the warden Minister and Governor in Council with regard thereto are hereby made and shall *mutatis mutandis* be equally applicable to an application for a public inquiry concerning an alleged breach of the labour covenant of a lease of private land.

(4) In case such lease is forfeited and declared void on the application of the holder or holders of a miner's right or rights the persons making the application shall not receive a lease of the land or the portion of the land applied for until the amount of compensation which the owner or owner and occupier is or are entitled to receive as in this Part provided has been paid or tendered to him or them and a statutory declaration verifying such payment has been furnished to the Minister. The compensation payable in respect of such land or portion of such land shall be determined on the complaint of such holder or holders of a miner's right or rights in the same manner as compensation is determined where the applicant for a lease and the owner or the owner and occupier of private land are unable to agree as to the amount of compensation to be paid. [cf, 62 Vic. No. 29 (W.A.), sec. 33 ; 51 & 52 Vic. No. 448 (S.A.), sec. 30].

Subdivision 9.—Encroachment..

102. If any person not being lawfully authorized under the provisions of this Part mines or attempts to mine or encroaches in under or upon or within the prohibited distance within the

Injunction may be granted to restrain encroachment without proof of special damage.

No. 1120, s. 347. meaning of section sixty-nine sub-section (*d*) and section seventy-one sub-section (5) from any private land the Supreme Court or the Court of Mines for the district in which the land is situate or the judge thereof or the warden may grant an injunction to restrain such mining or encroachment at the suit of the Attorney-General the owner of the land or of any person in lawful possession thereof without proof of any special or material damage. [cf. 62 Vic. No. 29 (W.A.), sec. 34].

Encroaching on
highways streets
&c.

Ib. s. 339.

103. The warden may upon the application of any corporation having the care and management of any public highway street or road or upon the application of any person authorized by such corporation by writing under the hand of the warden authorize any mining surveyor or surveyors either alone or together with some experienced miner or miners to enter upon and inspect any land or mines held as a claim or comprised in any lease under this Part or under the corresponding provisions of any enactment hereby repealed and every part thereof for the purpose of ascertaining whether the persons working such mines are encroaching on any public highway street or road and whether the mining operations carried on can be continued without causing injury or damage to such public highway street or road or to any house or building abutting thereon or adjoining thereto. [cf. 62 Vic. No. 29 (W.A.), sec. 35].

Encroaching on
private lands.
See ib. s. 340.

104. The warden may upon the application of the owner trustee or occupier of any land adjoining or within the prohibited distance within the meaning of section sixty-nine sub-section (*d*) and section seventy-one sub-section (5) of any land held as a claim or whereof a lease has been granted under the provisions of this Part or the corresponding provisions of any enactment hereby repealed or upon the application of any person authorized by such owner trustee or occupier by writing under the hand of the warden authorize such owner trustee or occupier or any person nominated as his agent by such owner trustee or occupier any mining surveyor or surveyors or some experienced miner or miners to enter into and inspect such mines and every part thereof for the purpose of ascertaining whether the persons working such mines are encroaching upon or within the prohibited distance within the meaning of section sixty-nine sub-section (*d*) and section seventy-one sub-section (5) of the land of any owner

trustee or occupier not being land comprised in the claim or lease of such person under the provisions of this Part.

105. The person or persons authorized by an order made under the authority of this Part may enter into and inspect and survey the land and mines described in such order and every part thereof, and descend any shaft or mine, and for such purpose use the engines and other machinery ordinarily employed for that purpose by the persons whose shaft or mine is descended; and the holder under any miner's right or the lessee of such shaft or mine or other person for whom the same is being worked shall provide all labour assistance appliances and materials necessary to facilitate such inspection and survey; and such person or persons authorized as aforesaid may make such plans and sections of the land entered upon and of any drives or other works therein as are necessary for the purposes aforesaid. Provided that the person or persons authorized by such order pays all costs attending such inspection such costs to be fixed by the warden. [cf. 62 Vic. No. 29 (W.A.), sec. 36].

Power of persons authorized to enter and inspect.
No. 1120, s. 341.

106. Every such owner occupier agent and mining surveyor or miner shall before entering on such land make a declaration before the warden (who is hereby authorized to take the same) that he the said owner occupier agent surveyor or miner will not (except as a witness in a court of justice) without the consent in writing of the holder under any miner's right or the lessee of the land or mines to be entered upon divulge or cause to be divulged to any person whomsoever any information obtained in the case of any such entry made for the purpose of ascertaining whether the persons working such mines are or have been encroaching on any public highway street or road, and whether the mining operations carried on can be continued without causing injury or damage to such public highway street or road, or the houses or buildings abutting thereon or adjoining thereto, or in the case of any such entry made for the purpose of ascertaining whether the persons working such mines are encroaching upon the land of any owner not being land comprised in the claim or lease of such persons save only as to whether such persons working such mines are encroaching on such public highway street or road or upon land of any owner (not being land comprised in the claim or lease of such persons as aforesaid) as the case may be, and every person

Owner occupier agent mining surveyor and miner to make a declaration.
Ib. s. 342.

who acts contrary to such declaration shall forfeit and pay any sum not exceeding Fifty pounds to be recovered in a summary way before any justice. [cf. 62 Vic. No. 29 (W.A.), sec. 37].

Warden may enjoin persons to desist from trespassing.

See No. 1120, s. 343.

107. The warden may upon the application of the corporation or applicant obtaining an order under the provisions of this Part (such application to be made on notice served twenty-four hours at least before the time of the making thereof on the parties interested in opposing the same or such of them as appear to the warden sufficiently to represent the parties so interested) in the presence of such parties or such of them as aforesaid, or in the absence of any of them upon whom service of such notice is proved to the satisfaction of the warden hear receive and examine evidence, and thereupon if he in his discretion think fit by order under his hand enjoin all persons named in such order and all other persons mining on the land or in the mines mentioned in the said order to desist from trespassing upon or driving in under or upon any public highway street or road or from continuing to carry on any mining operations which in the opinion of the warden will cause damage or injury to any public highway street or road or any house or building abutting thereon or adjoining thereto or from encroaching on the land of any owner not comprised in a claim or a lease granted under the provisions of this Part. [cf. 62 Vic. No. 29 (W.A.), sec. 38].

Order of warden.
Ib. s. 344.
Third Schedule.

108. Every order made by the warden under the preceding section may be in the form contained in the Third Schedule to this Act or to that effect, and every such order shall (except the warden otherwise direct) be served by delivering a copy to the person or to any one of the persons to be bound thereby, and at the same time showing the original order if the person or persons to be bound thereby or any of them require to see the same and by affixing a copy thereof on some conspicuous place on the land mentioned in such order. If for any reason such copy cannot be delivered to the person to be bound thereby the said affixing of the copy shall be sufficient. The cost of obtaining any such order shall be in the discretion of the warden. [cf. 62 Vic. No. 29 (W.A.), sec. 39].

Disobeying order.
Ib. s. 345.

109. If after a copy of the said order of injunction have been affixed on some conspicuous place as aforesaid the same be disobeyed, every person working in the mine in the land mentioned

in the said order and the person in charge of the mining operations carried on in the said mine and the occupiers of the said land shall each be considered to have disobeyed the said order. [cf. 62 Vic. No. 29 (W.A.), sec. 40].

110. Any person who disobeys any of the said orders or obstructs or otherwise interferes with any person authorized by the warden as aforesaid to enter upon any land for the purpose aforesaid shall be liable to a penalty not exceeding Fifty pounds to be recovered in a summary way before any court of petty sessions, and shall also be liable to be dealt with under section two hundred and forty-nine of the Principal Act, and a breach or obstruction of or interference with any of the said orders shall be deemed to be a disobedience of an order within the meaning of that section. [cf. 62 Vic. No. 29 (W.A.), sec. 41].

Penalty.

See No. 1120,
s. 346.

Subdivision 10.—Power of Survey.

111. (1) Any surveyor acting under the authority of the Minister of Mines and any other person acting in aid or under the orders of such surveyor may from time to time without making compensation—

Survey officers
may enter upon
any private
lands.

Compare No.
1106, s. 116.

- (a) enter into and upon any land of any person or persons whomsoever for the purpose of making and carrying on a survey thereof and for the purpose of fixing any object to be used in the survey on any post stone or boundary mark whatsoever, and
- (b) fix and place any such object post stone or boundary mark whatsoever in the land or upon any wall tree or post in the land of any person whatsoever, and
- (c) dig up any ground for the purpose of fixing any such object post stone or boundary mark, and
- (d) cut down and remove any scrub or timber other than ornamental timber fruit trees or vines which may obstruct any survey line.

(2) Such surveyor and his assistants and workmen shall do as little damage as may be in the execution of the several powers conferred on them by the said authority or orders. [cf. 62 Vic. No. 29 (W.A.), sec. 42].

Subdivision 11.—Miscellaneous.

Power of applicant to transfer interest.
See Transfer of Land Act, s. 40.

112. Any applicant for a mining lease may with the approval of the Minister and in accordance with the regulations transfer the whole or any portion of his interest in his application to any person. And in the event of the death of an applicant for a lease such lease may be granted in the name of such applicant and be executed by his executor or administrator and shall devolve or pass in like manner as if the lease had been executed prior to the death of the applicant. [cf. 62 Vic. No. 29 (W.A.), sec. 43].

Private lands may be excepted from mining.

113. The Governor in Council may at any time except from occupation for mining purposes any specific portions of private lands, and no land so excepted shall be marked out or occupied under any provision of this Part for mining purposes until such exception be revoked by the Governor in Council. [cf. 62 Vic. No. 29 (W.A.), sec. 46].

Conditions in future leases by trustees.
See No. 1251, s. 20.

114. In every lease of land granted by the trustees pursuant to the *Agricultural Colleges Act* 1890 there shall be inserted covenants and conditions providing that the land demised is granted subject to any claim occupied under the provisions of this Part or any gold mining lease or mineral lease of such land which thereafter may be granted by the Governor in Council in accordance with the provisions of this Part.

Easements over private land.
See No. 1120, s. 335.

115. In case it is necessary for the proper working of a mine comprised in any claim held or any lease granted under this Part or under the corresponding provisions of any enactment hereby repealed or of a lease or claim held under Part I of the Principal Act that water should be conveyed therefrom or brought thereto or from or to any shaft or works thereon from any river stream or other water-course or from any lake water-hole dam reservoir or place where water is artificially stored it shall be lawful for the Governor in Council in the name and on behalf of Her Majesty to enter upon so much of any private land as may be required for the construction of a race or flume or for the laying of pipes for the bringing of such water to or from the said mine or claim and to grant to any person requiring to remove or using such water a lease of such private land as may be required for such construc-

tion, and the rent for the land comprised in any such lease shall be Sixpence per acre per annum. [cf. 62 Vic. No. 29 (W.A.), sec. 47].

116. Every such lease shall be obtained and compensation for surface damage to be done to the land comprised therein shall be ascertained and paid as hereinbefore in this Part provided and shall be as nearly as may be in the form and subject to and contain the terms provisions and conditions contained in leases under this Part. [cf. 62 Vic. No. 29 (W.A.), sec. 48].

Compensation;
form &c. of
lease.
See No. 1120,
s. 335.

117. When a lease of any private land has been granted to any person or when such land has been occupied as a claim by the holder of a miner's right under the provisions of this Part or the corresponding provisions of any enactment hereby repealed and such land is severed or any part thereof is separated from the other part or parts thereof by the private land of any other person over which a mining lease has been granted or which has been occupied as a claim as aforesaid and is occupied for mining purposes at the time of the application for the licence hereinafter mentioned, it shall be lawful for the Governor in Council to grant to such first-mentioned person or holder a licence to construct a drive or drives through such private land so severing or separating such land for the purpose of enabling the whole of such first-mentioned land to be effectually worked and mined. This section shall not apply to any private land on which any church is situated. [cf. 62 Vic. No. 29 (W.A.), sec. 50 ; 62 Vic. No. 24 (Q.), sec. 62].

Power for the
Governor in
Council to grant
licences to
construct drives
through land
occupied for
mining purposes.
See No. 1189,
s. 12.

118. Every such licence shall be for such term not exceeding fifteen years, and shall be in such form and subject to such reservations covenants and provisoes as the Governor in Council shall determine. [cf. 62 Vic. No. 29 (W.A.), sec. 51].

Term and form
of licence.

119. No such licence shall authorize the construction of a drive at a depth of less than four hundred feet from the surface of any such private land as measured from the lowest part of the surface. [cf. 62 Vic. No. 29 (W.A.), sec. 52].

Not to be
effectual within
400 feet of
surface.

120. If any lease of any private land be declared void or forfeited or determined by reason of any breach of any of the covenants or conditions or otherwise any lease issued or claim

Tributer
entitled to lease.
See No. 1120,
s. 335.

taken possession of under or in pursuance of such forfeiture or determination shall be subject to all the rights then existing of any person mining on such land as a tributer or sub-tributer ; any tribute agreement which at the time of the forfeiture or determination of the lease existed between the lessee or the tributer shall in the event of a new lease being granted be deemed to continue between the new lessee and the tributer : Provided that such agreement shall not run during such period (if any) as the tributer is by reason of the forfeiture prevented from working his tribute, and the tribute agreement shall be deemed to be extended for such period beyond the time at which it would otherwise have terminated.

Future tribute agreements.

121. It shall not be lawful after the commencement of this Act to assign underlet or part with all or any of the land demised under any mining lease or of any premises thereupon or to let a tribute in regard thereto without the sanction in writing of the Minister.

Owner of land or buildings in vicinity of leased land entitled to compensation for loss and damage caused by mining.
See No. 1120, s. 309.

122. If any land or buildings thereon adjoining or in the vicinity of any land occupied as a claim or held under any lease granted under this Part or the corresponding provisions of any enactment hereby repealed be injured or depreciated in value by any operations carried on by the occupier of the claim or lessee, the owner of such land or buildings shall be entitled to compensation for all loss and damage thereby sustained by him, and the amount of such compensation shall be ascertained in the same manner as the amount of compensation is ascertained under the provisions of this Part. [cf. 62 No. 29 (W.A.), sec. 53 ; 57 Vic. No. 32 (N.S.W.), sec. 21].

Validation of certain mineral leases.
No. 1202, s. 3.

123. All mineral leases granted by the Governor in Council between the twenty-ninth day of December One thousand eight hundred and eighty-four and the twentieth day of December One thousand eight hundred and ninety authorizing any person to mine upon any pastoral allotment or grazing area shall from the time of such granting be deemed to have had and to have the like force and effect as if they had been granted pursuant to law. Provided however that this section shall not affect any action cause suit or matter or proceeding in any court duly begun or pending on or before such last-mentioned date.

124. Any person who not being authorized so to do under a lease or by virtue of a miner's right takes or removes (a) any gold found or being in any private land or (b) any minerals found or being in any private land not alienated in fee simple from the Crown on or before the first day of March One thousand eight hundred and ninety-two shall on conviction before a court of petty sessions pay for every day during which he takes removes or continues to take or remove any such gold or minerals a penalty not exceeding Five pounds and forfeit all the gold or minerals which he has so taken or removed, and shall be liable on a second conviction to be imprisoned for a period not exceeding twelve months in addition to forfeiting any gold or minerals so taken or removed. [cf. 62 Vic. No. 29 (W.A.), sec. 54].

Penalty for removing gold and minerals.
See No. 1120, s. 348.

125. (1) In case any lease granted under the authority of this Part or the corresponding provisions of any enactment hereby repealed is or is liable to be forfeited or declared void or determined by any breach of covenant or conditions or otherwise, or in case the term thereby granted has expired, possession of the mines demised shall and may be recovered on behalf of Her Majesty in such manner as may be provided by any of the conditions of such lease.

Ejectment may be brought in the Court of Mines.
Ib. s. 337.

(2) If there be no such conditions it shall be lawful for the Attorney-General on behalf of Her Majesty to bring a suit in the Court of Mines in the district in which the land comprised in such lease is situated to recover possession of such land or the mines thereunder; and such suit shall be commenced and carried on as any other suit in the Court of Mines and the proceedings therein shall be the same and the judgment therein enforced in like manner as in the case of any other suit in the said court.

126. (1) The Governor in Council may make regulations for the carrying into effect all or any of the provisions of this Part.

Regulations.
Ib. s. 340.

(2) All such regulations shall be laid before both Houses of Parliament within twenty-one days after the same have been made or if Parliament be not then sitting within twenty-one days after the commencement of the next ensuing session thereof; and if an address be presented to the Governor by either House of Parliament within the next subsequent twenty-one days on which the

To be laid before Parliament &c.

said House shall have sat praying that such regulations or any portion thereof may be annulled the Governor shall thereupon by Order in Council annul such regulations or portion thereof as the case may be, and the same shall thenceforth become void and of no effect but without prejudice to the validity of any proceedings which may in the meantime have been taken under the same.

PART III.—GENERAL PROVISIONS.

Construction of Part III. **127.** This Part shall be read and construed as one with Part III of the Principal Act.
See No. 1120, ss. 351-399.

DIVISION I.—REGULATION AND INSPECTION OF MINES AND MINING MACHINERY (a).

Interpretation of terms. **128.** In this Division of this Part if not inconsistent with the context or subject matter—
Ib. s. 351.

“Machinery.” “Machinery” means and includes steam and other engines boilers furnaces stampers winding and pumping gear whims whips windlasses chains trucks tramways tackle blocks ropes tools and all appliances of whatsoever kind used for the treatment of ores or for any mining purpose :

“Mine.” “Mine” means and includes any claim place pit shaft drive level or other excavation drift gutter lead vein lode reef wherein or whereby is or shall be or has been carried on any operation for or in connexion with the purpose of obtaining any metal or mineral by any mode or method or of stacking or otherwise storing any substance as containing any metal or mineral or wherein operations are carried on for the treatment of the products of any mine :

“Mining manager.” “Mining manager” means the person having the management of the mining operations carried on in a mine :

“Owner.” “Owner” includes a company incorporated under any Act as a mining company.

(a) Cf. 62 Vic. No. 24 (Q.), Part XIII, sec. 193 ; 59 Vic. No. 37 (W.A.), Part VII, and 63 Vic. No. 35 (W.A.) ; Regulations under 37 Vic. No. 13 (N.S.W.), July 6, 1889 ; Regulations under 56 & 57 Vic. No. 587 (S.A.), Part XI, cl. 236-248 ; 57 Vic. No. 24 (Tas.), Part VI, sec. 88 ; 62 Vic. No. 38 (N.Z.), Part V, sec. 183.

129. Any accident occurring in a mine shall be *prima facie* evidence that such accident occurred through some negligence on the part of the owner.

In case of accident presumption against mine-owner.

See No. 1120, s. 352.

Subdivision 1.—Regulation of Employés.

130. Boys under the age of fourteen years and females shall not be employed below ground in any mine ; and no boy under the age of eighteen years shall be employed at any time as lander or bracedman at any plat or landing place either at or below the surface ; and no person shall be so employed for more than forty-eight hours in any week nor more than eight hours in any day except in cases of emergency.

Who shall not be employed in mines.

Ib. s. 353.

131. No person shall be deemed to be guilty of an offence against this Division for a contravention of so much of the next preceding or the next following section as relates to the time for which persons shall not be employed below ground if such person prove before any court of petty sessions that there were special circumstances to render such contravention necessary for the proper working of the mine, and that such contravention was not injurious to the workmen employed in the mine.

Special circumstances.

See ib. s. 353.

132. No person shall be employed below ground in any mine for more than eight consecutive hours at any time nor for more than forty-eight hours in any week except in cases of emergency, and a person shall be deemed and is hereby declared to be employed below ground and in the service of the owner of a mine from the time that he commences to descend a mine until he is relieved of his work and commences to return to the surface by the authority of the owner or his agent.

Persons not to be employed below ground more than eight hours in any day.

Ib. s. 354.

133. No person in charge of machinery on which steam water electricity or air or any two or more of them are used as a motive power in connexion with any mine or for the treatment of the products of any mine shall be employed for more than eight consecutive hours at any time or for more than eight hours in any twenty-four hours ; such period of eight hours shall be exclusive of any time occupied in raising steam or supplying air and in drawing fires and exhausting steam in connexion with the machinery in the charge of such person and of any time in which

Regulation of employment of persons in charge of machinery &c.

Ib. s. 355.

such person is employed in case of breakage emergency or necessity.

Penalty.
No. 1120, s. 356.

134. Every person in charge as aforesaid who is guilty of negligence by which any property is destroyed or damaged shall be guilty of an offence against this Division of this Part of this Act.

Subdivision 2.—General Rules.

General rules.

135. The following general rules shall so far as may be reasonable be practicable be observed in every mine :—

1. An adequate amount of ventilation that is to say not less than one hundred cubic feet of air per minute for each man and boy and one hundred and fifty cubic feet per minute for each horse employed underground in a mine excepting in cases where noxious gases exist to a dangerous degree when the quantity of air required shall be increased to five hundred cubic feet respectively shall be constantly produced in every mine to such an extent that the shafts winzes levels underground stables and working places of such mine and the travelling roads to and from such working places shall be in a fit state for working and passing therein. And all drives in quartz workings by which any two mines are connected shall if considered necessary by the inspector of mines be kept open for ventilation and for escape drives and upon the order of an inspector of mines authorized by the Minister companies shall construct such connecting drives where the works are not more than three hundred feet apart for ventilation and escape at their joint expenses and where deemed necessary for the purposes of ventilation by the inspector of mines if authorized by the Minister all levels shall be connected with winzes. But this shall not apply to alluvial mines except where in the opinion of an inspector if authorized by the Minister it is considered necessary.

2. Gunpowder or other explosive or inflammable substance shall only be used in a mine as hereunder provided (that is to say) :—

- (a) It shall not be stored in the mine unless in such magazine and in such quantities as may in writing be approved of by the Minister.
- (b) Without such written authority it shall not be stored in the mine in any quantity exceeding what would be required for use during six working days for the purposes of the mine ; and if stored in the mine it shall be kept in a drive or chamber separated by a door fixed across such drive of which the mining inspector shall approve.
- (c) Explosives when taken from the magazine for use in the workings shall be conveyed direct down the shaft to such workings and

shall not be taken for use into the workings of the mine except in a securely covered case or canister containing not more than eight pounds of gunpowder or five pounds of nitro-glycerine compound.

- (d) All nitro-glycerine kept for use in any mine shall be kept in the custody of the manager of such mine or of some person appointed for that purpose, and if such manager or person issues a greater quantity of such nitro-glycerine than is reasonably sufficient for use in such mine during the six days next following the time of such issue or negligently omits to retake possession of any quantity of nitro-glycerine not so used at the end of the week's work or which at any time appears not likely to be soon required or negligently permits any nitro-glycerine to be retained removed or disposed of by any other person, or if any person other than such manager or person retain remove or dispose of any such nitro-glycerine contrary to the provisions of this section such manager or person shall be liable to a penalty not exceeding Fifty pounds and such nitro-glycerine may be forfeited.
- (e) A workman shall not have in use at one time at any one place more than one of such cases or canisters.
- (f) No person shall enter with a naked light a powder magazine or any excavation in a mine where powder or other explosive or inflammable substance is stored.
- (g) No iron or steel pricker shall be used in blasting in any mine, and no iron or steel tool shall be used in charging tamping or ramming, and no iron or steel pricker or tamping bar shall be taken into any mine and where nitro-glycerine explosives are used only wooden rammers shall be used in charging.
- (h) No boy under the age of eighteen years shall be allowed to charge a hole with explosives or to fire any charge of explosives.
- (i) No drill hole shall be bored in any remaining portion of a hole in which a charge of nitro-glycerine compound has been previously exploded.
- (j) In all cases where the fumes arising from the explosion of any nitro-glycerine compound cannot be effectively dispersed by ventilation or spray of water from the mine, such fumes shall be neutralized or rendered innocuous by the person in charge of the blasting operations by the use of a spray of solution of sulphate of iron before the miners are permitted to return to the sites of such blasting operations.
- (k) Mining companies or persons employing miners in blasting with nitro-glycerine compounds shall supply such miners with the

means of thawing such compounds and with the means of producing sulphate of iron spray.

(7) A charge which has missed fire may be drawn by a copper pricker, but shall not excepting charges fired by an electric current be visited until one hour has elapsed from the time of lighting the fuse of such charge ; but in no case shall an iron or steel drill be used for the purpose of drawing or drilling out such charge.

3. Every underground plane on which persons travel which is self-acting or worked by an engine windlass or gin shall be provided (if exceeding thirty yards in length) with some proper means of signalling between the stopping places and the ends of the plane and shall be provided in every case at intervals of not more than twenty yards with sufficient man-holes for places of refuge.

4. Every road on which persons travel underground where the produce of the mine in transit exceeds ten tons in any one hour over any part thereof and where the load is drawn by a horse or other animal shall be provided at intervals of not more than one hundred yards with sufficient spaces or places of refuge, each of which shall be of sufficient length and of at least three feet in width between the waggons running on the tramroad and the side of the road.

5. Every man-hole and space for a place of refuge shall be constantly kept clear, and no person shall place anything in a man-hole or such space so as to prevent access thereto.

6. All entrances between the bottom of every working or pumping shaft and the poppet-head pulley wheels and all elevated platforms where automatic or safety doors are erected or self-acting catches are used shall be properly and securely fenced railed or securely covered, but this provision shall not be taken to forbid the temporary removal of any fence or cover for the purpose of repairs or other operations if proper precautions are used, and every abandoned or disused shaft or dangerous excavation shall be fenced or securely covered in by the lessee or registered owner thereof and the position of such covered shaft indicated on the surface by a post with a notice thereon affixed.

7. At all plats where hauling operations are carried on doors shall be fixed with a lever or handle attached whereby the said doors can be safely lowered into position or raised without possible danger to the person performing the duty.

8. When a fence or cover has been temporarily removed from any entrance to a shaft to admit of the performance of ordinary mining operations two strong horizontal bars shall be securely fixed across such entrance not less than two nor more than four feet from the floor of the brace chamber or drive as the case may be.

9. Every working or pumping shaft shall be securely cased lined or otherwise made secure.

10. When a shaft is being sunk in rock formation and blasting operations are necessary short cross-drives or man-holes shall be formed at depths of every two hundred feet for use by miners as places of refuge during the occurrence of blasts, and access to such man-holes shall be provided by the use of suitable ladders from the bottom of the shaft to the surface affording access to each man-hole.

11. Every drive and every excavation of any kind in connexion with the working of a mine shall be securely protected and made safe for persons employed therein.

12. Suitable lights effectually protected from draughts of air shall be provided for the use of miners in every working plat and in the main drives of any mine, and the upper entrance to every winze rise or jump-up while open or unfenced shall be illuminated by a fixed light.

13. Where one portion of a shaft is used for the ascent and descent of persons by ladders or a man-engine and another portion of the same shaft is used for raising material the first-mentioned portion shall be cased or otherwise securely fenced off from the last-mentioned portion and shall have a division between buckets ascending and descending where the shaft exceeds one hundred feet in depth.

14. Every working shaft in which a cage is used and every division of such shaft in which persons are raised and lowered and every shaft in which appliances worked by steam machinery are used shall be provided with guides and some proper means of communicating distinct and definite signals from the bottom of the shaft and from and between every entrance for the time being in work between the top and the bottom of the shaft to the top and thence to the engine-room and from the engine-room and top to the bottom of the shaft and to and between every entrance for the time being in work between the top and the bottom of the shaft, and such signal line shall be balanced so as to be easily worked by hand without the aid of a lever, and no verbal signals or communications shall be made up or down a shaft exceeding twenty yards in depth in which cages are used except through speaking tubes or telephones in the pump compartment of such shaft, and every person employed in a mine shall make himself acquainted with the system of signals provided hereby. A line or some other appliance shall be provided in each shaft to admit of danger signals being communicated to the engine-driver from any portion of such shaft.

15. A clear view shall be kept for the engine driver between his station and the shaft or tunnel or adit at the surface entrance and brace.

16. Any code of signals that may at any time be prescribed by order of the Governor in Council shall be that used in all mines, and no other method shall be made use of. Separate codes may be prescribed for different classes of mines.

17. Whenever any underground work is being performed in alluvial mines at greater distances than two hundred feet from the shafts proper means shall be provided for communicating along the lower drives of such mines distinct and definite signals to and from the plats at the bottom of the shafts and to or from such places in which men may be at work.

18. Every shaft exceeding two hundred feet in depth where engine power is used for winding shall be provided with a cage and such cage shall have a sufficient cover overhead when used for lowering or raising persons in any working shaft; such cage cover shall be at least six feet six inches above the floor of the cage and shall be constructed of iron not less than three-eighths of an inch or of steel not less than one-quarter of an inch thick, and shall be securely hung on hinges and fitted with sloping sides so as to be readily lifted upwards by persons within the cage; and no tools or material shall be taken up or down the shaft when men are in the cage. Except when repairing the shaft all persons working in shafts shall be protected overhead from falls of material down such shafts by means of a roof or other suitable appliance. Nothing in this rule contained shall prevent the use of buckets or skips during the sinking of shafts or winzes or for raising or lowering mining material mine products or débris.

19. A whip shall not be used for the sinking of shafts or for lowering or raising men unless two-thirds of the shaft is covered by a pent house.

20. Every brace shall have adequate protection provided for the workmen from the inclemency of the weather.

21. A proper ladder or footway shall be provided in every shaft used for men ascending or descending whether machinery be used or not.

22. When chains are employed as couplings to cages or tanks two single-linked chains of uniform size shall be used to each coupling.

23. There shall be attached to every machine worked by steam water or mechanical power erected after the passing of this Act and used for lowering or raising persons an adequate brake or other sufficient appliance in addition to that on the fly wheel fitted to each winding drum in such a manner that it can be applied by the engine-driver without leaving the starting handle of the engine, and also a dial or indicator (in addition to any mark on the rope) to show to the person who works the machine the position of each of the cages or loads in the shaft.

24. Every cage used in a mine shall be fitted with special and suitable appliances to prevent its sudden fall down a shaft, and also a safety hook with suitable detaching appliances fixed to the poppet heads to prevent it coming into contact with the poppet heads and no safety hook shall be used that will not suspend a cage at the poppet head when detached from the ropes.

25. Automatic or self-acting doors or tumblers of a suitable kind shall be affixed to the skids or guides below the poppet heads of every shaft in which

a cage is used to prevent the fall of such cage down the shaft when detached from the rope or chain by overwinding, and such automatic or self-acting doors or tumblers shall be surrounded by proper platforms and hand railings, and at every plat or level where trucks are removed on or off the cage while in the shaft such shaft shall be fitted with bearers or gates securely fixed to the sole piece of the plat set with strong hinges, and loose wooden bearers shall not be used.

26. Gates shall be used in all shafts where hauling is done with cages. Such gates shall be secured to the sole plates of the plat sets, so that they can be easily placed over the shaft and raised without any trouble, and fixed to the satisfaction of the inspector of mines.

27. If more than four persons are employed in the mine below ground in one shift sufficient accommodation shall be provided above ground near the principal entrance of the mine and not in the engine-house or boiler-house for enabling the persons employed in the mine to conveniently dry and change their dresses, and in no case shall men be allowed to change their dresses upon a boiler.

28. Before any rope or chain is used in the shaft of a mine it shall be tested and proved to be equal to carrying twice the weight of the ordinary load which shall consist of the cage truck and contents and weight of rope from bottom of shaft to pit-head pulley, and the working load shall not be more than one-eighth of the breaking strain of rope, and in mines where men are lowered or raised in shafts the ropes and chains used for such purposes shall be tested at such intervals as an inspector of mines may require to carry twice the weight of the ordinary load. Before any ropes are used for winding in a mine including capstan ropes the manager or owner shall obtain a certificate from the manufacturer showing their breaking strain, such certificates to be available at the mine for the perusal of the inspector.

29. There shall be on the drum of every machine used for lowering or raising persons such flanges or horns and also if the drum is conical such other appliances as may be sufficient to prevent the rope from slipping.

30. No person under the age of twenty-one years shall be placed in charge of or have the control of any winding engine, and no person under the age of eighteen years shall be placed in charge of or have the control of any other steam engine or boiler used in connexion with the working of any mine. No person in charge of steam machinery in connexion with the working of any mine shall under any pretext whatever unless relieved by a competent person for that purpose absent himself or cease to have continual supervision of such machinery during the time it is used in working the mine, and every winding-engine shall be in charge of an engine-driver during the time miners are employed underground in the mine unless in any case the inspector of mines certifies in writing that the underground workings are so shallow that the services of an engine-driver are not necessary.

31. All machinery in which steam water or air or any two or more of them are used as motive power shall be subject to the provisions of the Mines Acts so far as the same shall reasonably apply, and no such machinery erected or fitted up after the passing of this Act shall be employed until it has been examined by an inspector appointed for that purpose and certified by him to be in proper and fit working condition.

32. All boilers compressors engines gearing and all other parts of machinery when used for any mining purpose or for the treatment of ores or for the treatment of the products of any mine shall be kept in a fit state and condition.

33. Every fly wheel and all exposed or dangerous parts of the machinery and every tramway constructed on an elevated platform shall be and be kept securely and safely fenced.

34. Every steam boiler coming into use after the commencement of this Act shall be provided with a proper steam gauge and two water gauges to show respectively the pressure of steam and the height of water in the boiler, and with two proper safety valves, one to be locked; and at least once in every six months every boiler shall be thoroughly cleansed, and once in twelve months every such boiler shall be subjected to an examination and hydraulic test, the test of working boilers shall be half as much more than the pressure at which the safety valve blows off and that of new boilers double the intended working pressure. Air receivers shall be tested once in three years to one-third over the allowed working pressure. Steam gauges shall be tested and adjusted once in twelve months, and no gauge shall be passed which varies more than five pounds from the standard gauge. The date and full description of every such cleansing and test under this rule shall be entered in a book to be kept on the mine by the engineer in charge or by the mining manager where no such engineer is employed on the mine or by an engine-driver or bracedman, and the entries in such book shall on demand be open to the inspection and perusal of any inspector under this Act. No boiler shall be placed in position or built in before an inspector has examined and passed it.

35. No person shall wilfully damage or without proper authority remove or render useless any fencing casing lining guide means of signalling signal cover chain flange horn brake indicator ladder platform steam gauge water gauge safety valve or other appliance or thing provided in any mine in compliance with the Mines Acts, and no person shall after any shaft has become disused for mining purposes wilfully damage or render useless such shaft by the removal of any fencing covering casing lining ladder platform or other appliance provided in such shaft without the consent of the Minister.

36. In every working in a mine approaching a place likely to contain a dangerous accumulation of water or fire damp boring rods shall be kept and used for the purpose of perforating the ground twenty feet in advance in alluvial mines and ten feet in quartz mines of or near or at any angle from

such working, and no drive gallery or other excavation shall be made within a dangerous distance of such accumulation of water or fire damp, and safety lamps shall be provided for the use of the miners whilst working in such places.

37. In every alluvial mine which in the opinion of an inspector is liable to any inundation or inburst of water such additional rises chambers drives and other workings or any of them shall be constructed as may seem necessary and as may be ordered by the Governor in Council for the escape of workmen from the lower workings or to ensure their safety in every such mine during the period of any inundation or inburst of water in such mine.

38. When men are being lowered or raised in any shaft by means of machinery the rate of speed for the descent or ascent of such men shall not exceed within one hundred feet of the surface of a mine two hundred feet in each minute of time, and shall not in any other part of a shaft exceed five hundred feet in each minute of time.

39. Before any safety cage be first used it shall be tested in the presence of the local inspector of mines to show that it is supplied with proper appliances, and no such cage shall be used unless and until such inspector gives a certificate to the effect that such cage is in fit working order and condition, the mining manager or engineer in charge shall test the cages at least once in every two months and enter the result in his record book all cages to be tested from the drums.

40. In any shaft exceeding twenty feet in depth in which cages are not used no person shall descend or ascend by the aid of machinery unless in addition to the use of the loop cross bar or other appliance he be securely stayed to the rope employed for lowering or raising in such shaft by a strap or other fastening passing round the body under the arms, and such method of staying shall be used by every person who finds it necessary in the execution of his duty to descend or ascend a shaft on top of the cage covers.

41. A ladder permanently used for the ascent or descent of persons in the mine shall not be fixed in a vertical or overhanging position unless in shafts used exclusively for pumping, and shall be inclined at the most convenient angle which the space in which the ladder is fixed allows, and every such ladder inclusive of ladders fixed in pump shafts shall have substantial platforms at intervals of not more than thirty feet and a suitable fixture for a hand grip shall be placed above such ladder for the use of persons ascending or descending such ladder.

42. Ladders and when necessary convenient platforms connected therewith shall be provided in each rise jump-up or passage giving access to working at a higher level in a mine, and a notice shall be posted at the foot of each such rise jump-up or passage stating the height of such rise jump-up or passage to the chamber or drive above.

43. The mining manager of every mine or other competent person or persons appointed for such purpose shall once at least in every twenty-four hours examine the state of all safety appliances or gear connected with the cages or shafts of the mine, and shall once in each week carefully examine the buildings machinery shafts levels planes and all places used in the working of such mine, and shall record in writing in a book to be kept on the mine for that purpose his opinion as to their condition and safety and any repairs and as to any alterations required to insure greater safety to the persons employed in the working of such mine, and such book shall on demand be open to perusal by any inspector under the Mines Acts; and every such safety appliance or gear if condemned by any inspector of mines or machinery shall be forthwith removed or made fit.

Non-compliance with rules.

136. Any person who contravenes or does not comply with any of the general rules and any mining manager or engineer in charge or person in charge of or giving orders or directions relating to the carrying on of any mining operations in a mine who contravenes or does not comply with any of the general rules shall be guilty of an offence against this Division of this Part of this Act unless he proves that he had taken all reasonable means to prevent such contravention or non-compliance.

Posting up of general rules.

137. A printed copy of the general rules shall be posted in the office and on a building or board in some conspicuous place in connexion with every mine.

Subdivision 3.—Board of Examiners for Engine-drivers.

Board of examiners for engine-drivers. See No. 1120, s. 358.

Certificates of competency for engine-drivers. See sec. 142.

138. (1) There shall be a board of examiners for engine-drivers as hereinafter provided.

(2) The said board shall be empowered to hold examinations and to examine persons who may be desirous of qualifying themselves as engine-drivers subject to such regulations as may from time to time be approved by the Governor in Council and to grant first and second class certificates of competency to such persons as successfully pass the prescribed examinations.

Subdivision 4.—Mining Managers.

Every company to have a registered manager. Appointment of manager of mine.

139. (1) Every mine shall be under a manager who shall be deemed the mining manager of such mine under this Division of this Part of this Act and who shall be responsible for the control management and direction of the mine, and the owner of every

such mine shall nominate himself or some other person to be the manager of such mine and shall send to the inspector of mines of the district written notice of the manager's name and address.

*See 50 & 51 Vict.
c. 58, s. 20.
Compare No.
1120, s. 372.*

(2) At the expiration of six months from the commencement of this Act if any mine in which more than twelve men are employed is worked for more than fourteen days without there being such a manager for the mine as is required by this section, the owner of the mine shall be liable to a penalty not exceeding Twenty pounds, and for a second offence to a penalty not exceeding Fifty pounds, and to a further fine not exceeding Five pounds for every day during which the mine is so worked. Provided that the owner of the mine shall not be liable to any such penalty if he proves that he had taken all reasonable means by the enforcement of this section to prevent the mine being worked in contravention of this section.

140. Every action to recover damages against any owner or employer in respect of any injury sustained by reason of an accident in a mine shall subject to the provisions of any law for the time being in force as to the venue of County Court actions be brought in any County Court whatever be the amount claimed and except as hereinafter mentioned such action shall not be brought in the Supreme Court. Provided always that if it appear to any Judge of the Supreme Court on application of either party that such action ought more properly to be brought in the Supreme Court such Judge may order that such action be brought in the Supreme Court or if it be already commenced be transferred to the Supreme Court.

*Conditions
under which
proceedings may
be taken.*

Provided further that there shall be the same right of appeal from the County Court to the Supreme Court as in other cases of actions brought in the County Court.

Subdivision 5.—Engine-drivers.

141. (1) The Governor in Council may from time to time appoint remove and re-appoint fit persons to act as a board to consider applications made by persons desirous of obtaining temporary permits to drive battery engines. Such board shall be composed of one certificated engine-driver and one mining manager.

*Battery engine-
drivers.*

(2) The section shall apply only to applications made by persons desirous of driving battery engines in places declared by the Governor in Council to be difficult of access.

Board of examiners for engine-drivers.
See No. 1120, s. 358.
See sec. 138.

142. (1) The Governor in Council may from time to time appoint remove and re-appoint fit persons to act as a board of examiners of engine-drivers under this Division, and the said board hereinafter referred to as the "Board of Examiners" shall be empowered to hold examinations and to examine persons who may be desirous of qualifying themselves as engine-drivers subject to such regulations as may from time to time be approved by the Governor in Council and to grant certificates of competency to such persons as successfully pass the prescribed examinations.

Certificate of competency for engine-drivers.

(2) The persons holding office at the time of the commencement of this Act as a board of examiners pursuant to section three hundred and fifty-eight of the Principal Act shall be the first board of examiners of engine-drivers under this Act.

Penalty on unqualified person taking charge of machinery.
See No. 1120, s. 361.

143. After the coming into operation of this Act any person who is not the holder of a certificate of competency as an engine-driver under this Act or the holder of a certificate of competency or of service as an engine-driver under the Principal Act or who is wholly or partially deaf or whose sight is defective or who is subject to fits giddiness or any other infirmity likely to interfere with the efficient discharge of his duties, and who takes charge of machinery in which steam water electricity or air or any two or more of them are used as motive power except water power used for pumping and every other person who employs any such person as aforesaid shall be guilty of an offence against this Division of this Part of this Act. Air winches sinking pumps and boring machines or puddling engines when fixed on an elevated puddling brace shall not be deemed to be "machinery" within the meaning of this section.

Disqualification of holder of certificate.
See ib. s. 362.

144. (1) Any person holding a certificate of competency or of service under this or the Principal Act or under *The Regulation of Mines and Mining Machinery Act 1883* as an engine-driver and who is charged with any offence or misconduct likely to be detrimental to the proper or efficient discharge of his duties may be called upon by the board of examiners for engine-drivers to

show cause why he should not be disqualified as a certificated engine-driver.

(2) If such person fails to satisfy such board why he should not be disqualified the Governor in Council by order published in the *Government Gazette* may disqualify such person for any specified period from acting as an engine-driver or may alter suspend or cancel such certificate.

(3) Any such person shall after such order deliver into the charge of the said board his certificate of competency or of service, which shall be retained by the said board during the period of his disqualification, and no such person shall during the period of such disqualification take charge of any machinery in which steam water electricity or air or any two or more of them are used as motive power.

Subdivision 6.—Boilers.

145. (1) On the recommendation of the board of examiners for engine-drivers the Minister may grant to any inspecting and consulting engineer a licence authorizing the holder thereof to test and examine any boiler used or to be used in any mine and to give a certificate that he has inspected and examined such boiler and that the same is in good and sufficient condition and fit for use.

Board of examiners may grant licences to engineers to inspect boilers and give certificates.

(2) The term "boiler" shall mean any boiler or closed vessel in which or by means of which water is heated to generate steam for working machinery in any mine.

Meaning of term "boiler."

(3) When a certificate has been given for any boiler as hereinbefore provided it shall not be necessary for an inspector pursuant to the general rules in Subdivision two of this Part of this Act to examine and certify as fit for use any such boiler before the same is employed in a mine.

Certificate of engineer may be in lieu of certificate of inspector.

(4) On the recommendation of the board of examiners for engine-drivers the Minister may cancel any such licence if it be proved to his satisfaction that the person to whom the same has been granted is incompetent or has supplied a false certificate as to the fitness for use of any boiler.

Licence to inspect boilers may be cancelled.

Subdivision 7.—Plans of Mines.

Plans to be
furnished.
See No. 1120,
s. 363.

146. If any mine wherein operations are carried on for the working of any metalliferous or mineral lodes or veins or of any metalliferous or mineral deposits is considered by the Minister to be likely at any time to contain dangerous accumulations of water, the Minister may by a notice in writing addressed to the manager of such mine order that an accurate plan and sections of the shafts drives levels and all other underground workings of such mine shall be made and deposited in the office of the mine, and within three months from the date of such order such plan and sections shall be so deposited in the office of the mine aforesaid. and all additions of any kind to the underground workings of such mine made after the date of such order shall be correctly delineated upon such plan and sections at intervals of not more than one month and such plan and sections shall contain complete information of all the underground workings up to the date of the abandonment of such mine. On such abandonment of any mine the plans or certified copies thereof shall be lodged with the mining registrar of the division in which such mine is situated for future reference if required.

Plans to be
drawn to scale
and to be open
for inspection.
See *ib.* s. 364.

147. Such plan and sections shall be drawn to a scale of not less than two chains to one inch or to such other scale as the plan then used in the mine has been constructed; and any person with the sanction in writing of the Minister shall be allowed to inspect such plan and sections lodged at the office of the mine and an inspector under this Division shall be permitted at any time when in the performance of his duty to examine the plan and sections of the underground workings of any mine; and any owner of a mine or any other person in charge of such plan and sections who fails to produce them for inspection when called upon to do so by an inspector shall be guilty of an offence against this Division.

Subdivision 8.—Compensation to Employés for Injury.

Employer to
compensate
employé injured
through non-
observance of
this Act.

148. (1) If any person employed in or about any mine suffer an injury in person or be killed owing to the non-observance in such mine of any of the provisions of this Division, such non-observance not being solely due to the negligence of the person

so injured or killed, or owing in any way to the negligence of the owner of such mine his agents or servants, the person so injured or his personal representatives or the personal representatives of the person so killed may recover from the owner compensation by way of damages as for a tort committed by such owner; and the amount of such compensation with the costs of recovering the same when determined shall constitute a charge on the mine and mining plant in or about which such person was so employed and all charges arising under the provisions of this section shall as between themselves be paid rateably.

*See No. 1120,
s. 366.*

(2) Any warden or warden and assessors if required either by the warden the plaintiff or the defendant shall have jurisdiction to hear and determine all claims for compensation not exceeding the sum of Two hundred and fifty pounds made under the provisions of this section.

(3) Suits for every such claim may be commenced and all proceedings therein had and taken in like manner as suits may be commenced before a warden, and all proceedings therein may be had and taken under the provisions of Part I of the Principal Act and any Act amending the same, all of which provisions shall be and the same are hereby declared to be applicable to suits to enforce claims for compensation hereunder.

(4) Nothing in this section contained shall take away from any person any right to take proceedings in respect of a claim for compensation in any court of competent jurisdiction.

Subdivision 9.—Inspection.

149. (1) Subject to the provisions of the Public Service Acts any competent person may be appointed an inspector of mines under this Division, and any such inspector or any person authorized in writing by the Minister or by a warden in that behalf may with such assistants as he thinks fit have access to and inspect any mine or machinery at any time for the purpose of ascertaining whether the provisions of this Division are being complied with.

*Inspection of
mine and
machinery.
See ib. s. 367.*

(2) The owner of such mine or machinery shall provide all labour and assistance necessary for that purpose.

(3) If any person fails neglects or refuses to comply with or offer any impediment or obstruction to the carrying out of the provisions of this section, he shall be guilty of an offence against this Division.

(4) Immediately upon any miner working in the mine making a complaint under this Division to any inspector, it shall be the duty of such inspector to make inquiry into the matter of such complaint and to take such other steps as he may deem necessary to investigate the matter, and the name of the informant shall not be divulged by the inspector.

(5) No inspector under this Division shall be allowed to hold any interest whatever in any mine in Victoria.

(6) All inspectors appointed under section three hundred and sixty-seven of the Principal Act and holding office at the time of the commencement of this Act shall be deemed to have been appointed under this section.

Subdivision 10.—Inquests.

150. (1) With respect to coroners' inquests on the bodies of any persons whose death may have been caused by accidents in mines the following provisions shall have effect (that is to say):—

(2) Any person having a personal interest in or employed in or in the management of the mine in which the accident occurred shall not be qualified to serve on the jury empanelled on the inquest; and it shall be the duty of the constable or other officer not to summon any person disqualified under this provision, and it shall be the duty of the coroner not to allow any such person to be sworn or sit on the jury, nevertheless whenever it is practicable one-half of the jurymen shall be working miners.

(3) The inspector of mines of the district or any other person appointed for the purpose shall be present at inquests and may examine witnesses and elicit evidence relative to the cause of death and to the issue whether the accident was attributable to negligence or any omission to comply with the provisions of this Act.

(4) The next of kin or the executor of the person whose death may have occurred may authorize any person in writing to be

present at the inquest and who may either personally or through the coroner or the inspector of mines put questions to any witness as to the cause of the accident.

Subdivision 11.—Miscellaneous.

151. Every person who contravenes or does not comply with any of the provisions of this Division of this Part of this Act or who is guilty of negligence by which any person is or might be injured or killed either by himself his agent or servant shall be guilty of an offence against this Division of this Part of this Act.

What is an offence against this Act.

See No. 1120, s. 368.

152. (1) Every person employed in or about any mine shall satisfy himself of the safety of any tubs chains tackle windlass ropes or other appliances he may use before commencing and whilst at work, and in case of any defect or insecurity he shall cease to use anything unsafe.

Employés to inform employers of breaches of Act. Ib. s. 369.

(2) Every such person who witnesses in or about any such mine any circumstance matter or thing which may be likely to produce therein danger of any kind, and every person who may be notified by any such person of any such circumstance matter or thing, shall notify the same to the person (if any) under whose immediate directions or control he may be.

(3) Every such person in sub-charge of and employed in mining operations in any part of a mine shall on changing his shift inform the person appointed to relieve him of the state of the workings in the part of the mine in which he has been employed.

153. The mining manager of every mine shall forthwith after the occurrence of any accident attended with serious injury to any person give notice thereof to the local inspector of mines, and any mining manager who omits to give such notice shall be guilty of an offence against this Division. Any portion of a mine where an accident occurs shall not be interfered with until inspected by the inspector or coroner's jury unless with a view of saving life or preventing further injury and if deemed necessary a public inquiry shall be held to ascertain the cause of the accident.

Notice of accident to be given to local inspector.

See ib. s. 370.

154. For the purpose of any proceeding taken under the provisions of this Division against any mining manager or engineer in charge or person in charge of or giving orders or directions

Burden of proof to lie on defendant.

See ib. s. 371.

relating to the carrying on of any mining operations in a mine the burden shall lie on the defendant of proving he is not such manager or person.

Penalty.

See No. 1120,
s. 376.

155. Every person who is guilty of an offence against this Division shall be liable to a penalty not exceeding if he is the owner mining manager or person in charge of or giving orders or directions relating to the carrying on of any mining operations in any mine Fifty pounds and if he is any other person Ten pounds for each offence, to be recovered in a summary manner before a court of petty sessions ; and the whole or any part of such penalty may be awarded by such court to any person injured or to the personal representative of any person killed in consequence thereof, and such award shall be in addition to any right of action such person or personal representative may have under this Division or otherwise.

Subdivision 12.—Regulations.

Regulations.

156. The Governor in Council may pursuant to the provisions of sections seventy-seven and seventy-eight of the Principal Act make regulations for—

- (a) the alteration of any dates fixed in any section whatever of this or the Principal Act or of the time within which anything may or may not be done or executed ; and
- (b) generally carrying out all or any of the provisions of this Division of this Act.

DIVISION 2.—DRAINAGE OF MINES.

Owners of
pumping
machinery may
require contribu-
tion from owners
of claims for the
drainage
thereof.

See *ib.* s. 378.

157. For section three hundred and seventy-eight of the Principal Act there shall be substituted the following section, namely :—

378. (1) The owner of any machinery whether erected before or after the commencement of this Act upon or near to any quartz reef or other mineral lode or any lead or other deposit of auriferous drift may require the owner of any mine the workings of which have reached the natural water-level drained by such machinery to contribute a fair share of the total expense of draining or drawing the water from the mines drained by such machinery.

(2) The owner of any machinery actually in use for raising head-water whether erected before or after the commencement of this Act upon or near to any lead may require the owner of any mine on the same lead or any branch thereof and within a distance of two miles, the workings of which mine have not reached the natural water-level, and which mine is not being worked or in which mine head-water is not being raised, to contribute a fair share of the total expense of raising head-water by such machinery. In this section "head-water" means water derived from or accumulated in or between two or more sheets of volcanic rock overlying any lead and above the natural water-level of such lead.

(3) In default of payment of any contribution as in this section provided or in case of disagreement respecting the amount of such share the owner of such machinery may summon the owner of any such mine before a warden, who may make an order on such owner to pay such sum or sums periodically or otherwise to the owner of such machinery as the warden shall think just and reasonable.

(4) The warden may upon making such order impose on the owner of such machinery such terms with regard to the efficient working thereof for the benefit of all parties as to such warden shall seem just and order the same to be performed, or may make such other order concerning the premises as the justice and equity of the case may demand and such orders from time to time may annul vary or alter. Provided that if either party shall desire to have the subject-matter of complaint heard before a warden and assessors the same shall be heard and determined before a warden and four assessors who are to be chosen from the warden's roll as being practical working miners and an order made accordingly, and such assessors shall be summoned chosen and sworn in the manner prescribed by Part I of this Act.

(5) The warden shall have all the powers and authorities in relation to summoning parties and the witnesses the taking of evidence and making and enforcing all such orders as aforesaid as he now has in any case which he has jurisdiction to hear and determine under or by virtue of the said Part I and either party may apply to the warden to reserve any question of law in the

form of a special case for the opinion of the Supreme Court which opinion such Supreme Court is to give and in such case proceedings may be stayed upon such terms as the warden shall think fit until such opinion shall have been given and all the provisions of the said Part I relating to the reserving by wardens of questions of law in the form of special cases for the opinion of the said Supreme Court and to the proceedings therein or thereon shall apply to all questions of law reserved or which parties may apply to have reserved in the form of special cases under this section and to all proceedings therein or thereon, and all the forms and proceedings to be instituted under this Division of this Part of this Act shall be as near as may be to those required under the said Part I as the different circumstances will admit. [cf. 56 & 57 Vic. No. 587 (S.A.), Part V].

DIVISION 3.

Subdivision 1.—Tribute Agreements.

Form of tribute agreements.
Fourth Schedule.

158. Every agreement for the working of a mine whether Crown lands or private lands or any part thereof on tribute may be in the form or to the effect of the Fourth Schedule to this Act.

Requisites of tribute agreements.
See secs. 51, 52.

159. (1) Every agreement under which a mine or any part thereof is intended to be so let on tribute shall by metes and bounds describe the land to be so let, and shall specify the minimum number of men to be kept employed by the tributers.

(2) Excepting in the case of a company under Part II of the *Companies Act* 1890 every such agreement shall be in writing and be signed in triplicate and within fourteen days from the first execution of such agreement—

- (a) one copy shall be retained by the owner of the mine; and
- (b) one copy shall be given by such owner to the tributer; and
- (c) one copy shall be filed by the owner of the mine with the warden of the district for which no fee shall be charged.

(3) When the owner of a mine is a company under Part II of the *Companies Act* 1890—

- (a) an entry of the tribute agreement shall be made in the minute-book or in a book to be kept for that purpose;

(b) a copy of such entry certified as a correct copy by the legal manager or any one director of the company shall be given to the tributer ; and

(c) a copy of such entry so certified shall be filed in the office of the warden of the district ;

compliance with the provisions of this sub-section shall be a sufficient compliance with the provisions of sub-section (2) of this section, and any such certified copy shall be evidence of the agreement.

(4) Any owner of a mine who fails to comply with the requirements of this subdivision shall be liable to a penalty not exceeding Twenty pounds, which may be recovered in a summary manner on complaint of the tributer or any one of the tributers if more than one in any court of petty sessions. Penalty.

160. (1) In the event of disputes arising between the owner and the tributer in respect of the ground held under tribute or to the gold or minerals the proceeds thereof or the payment of sustenance money such disputes shall be decided by the warden without assessors on complaint by either party. Disputes as to title.

(2) Every such complaint shall be deemed to be a proceeding within the meaning of section two hundred and nineteen of the Principal Act, and for the purpose of enabling wardens to hear determine and enforce such complaints all the provisions of Part I of the Principal Act applying to proceedings under such section shall equally apply to such complaints so far as the same may be applicable.

161. (1) All disagreements as to the manner in which the ground held under tribute is to be worked shall be referred in the first instance by either party to the inspector of mines for the district unless the parties shall otherwise agree. Disputes as to manner of working.

(2) If the decision of such inspector of mines after full inquiry by him is not accepted by both parties to the tribute agreement the question at issue shall be determined by the warden whose decision shall be final and conclusive and without appeal.

Sustenance money.

162. It shall be the duty of the owner to include and there shall be deemed to be included in every tribute agreement a provision for the payment of sustenance money out of the proceeds of any gold or minerals obtained under such agreement to each tributer not being a registered corporation upon such a scale as may be mutually agreed upon, but being not less than one-half of the usual rate of wages paid to miners in the district within which the ground to be held under tribute is situated, and such sustenance money shall after payment of the cost of crushing be a first charge in favour of the tributers upon any gold or minerals obtained under such agreement.

Percentage to be upon net value of gold &c. obtained.

163. (1) The percentage or proportion to which the owner and the tributer are respectively entitled under such agreement shall be calculated upon the net value of the gold or minerals obtained under such agreement.

(2) Such net value shall be ascertained by deducting the cost of obtaining such gold or minerals including the amount of sustenance money accruing to the tributer under such agreement during the time when such gold or minerals were obtained from the total value of such gold or minerals so obtained.

Grantor's proportion to include gold obtained by amalgamation &c.

164. Where the tribute agreement provides that the crushing or treating of the auriferous material shall be done by the owner the proportion of the gold to which the tributer is entitled under such agreement shall include gold obtained by amalgamation or from copper plates or from concentrates obtained by any method of ore dressing or obtained by any process of treatment according to arrangement mutually agreed upon as set forth in tribute agreement.

Work to be continuous.

165. (1) If work is not continuously carried on by the tributers the owner may cancel the tribute and if the tributers shall be dissatisfied they may within seven days after cancellation complain to the warden who shall hear and determine such complaint and decide whether or not such tribute shall be cancelled by reason of the tributer failing to continuously carry out the work, provided that the agreement shall not be ordered to be cancelled in any case where the tributers have been prevented from working

by causes over which they had not any control and of which notice had been given by them to the owner.

(2) Every such complaint shall be deemed to be a proceeding within the meaning of section two hundred and nineteen of the Principal Act, and for the purposes of enabling wardens to hear determine and enforce such complaints and of enabling appeals to be made from their decisions all the provisions of Part I of the Principal Act applying to proceedings under such section shall equally apply to such complaint so far as the same may be applicable. See No. 1202, s. 7 (2).

166. Except where expressly mentioned the foregoing provisions of this Division shall not apply to or affect any tribute granted to a company registered under Part II of the *Companies Act* 1890 before the coming into operation of this Part. Exception.

Subdivision 2.—Court of Mines in Melbourne.

167. (1) For the purposes only of enabling Judges of Courts of Mines to sit in Court or in Chambers and there transact business as effectually as if such Judge sat in Court or in Chambers within any mining district the building known as the Law Courts within the city of Melbourne shall be deemed to be within the Mining District of Castlemaine and to be a place appointed by the Governor in Council where a Court of Mines shall be holden for the said district. Law Courts Melbourne to be part of Castlemaine Mining District for certain purposes. See No. 1120, s. 115.

(2) For the purpose only of enabling proceedings to be taken for winding up any mining company of which the last registered office is or was situate in the city of Melbourne the said city shall be deemed and taken to be part of the Castlemaine Mining District. Melbourne part of Castlemaine Mining District for purpose of winding up certain companies.

Subdivision 3.—Priority of Wages.

168. (1) Part V of the *Companies Act* 1890 as amended by the *Companies Act* 1896 shall not apply to any mining company under Part I of the said first-mentioned Act or any company under Part II of the said Act. Part V of No. 1074 not to apply to mining companies.

Miner's wages and salaries to have priority of other debts.

(2) In the distribution of the assets of any mining company under Part I of the *Companies Act* 1890 or company under Part II of the said Act which is being wound up, or in the distribution of assets on the cessation of work of a no-liability company registered under Part II of the said Act, there shall be paid in priority to all other debts of whatsoever kind secured or unsecured all wages or salary not exceeding Fifty pounds of any clerk mining manager under manager handicraftsman miner labourer workman or servant whether over or under the age of twenty-one years who either before or after the commencement of this Act has entered into any contract in respect of services rendered to the company during two months before the commencement of the winding up or the cessation of work. The foregoing debts shall rank equally among themselves and shall be paid in full, unless the assets of the company are insufficient to meet them, in which case they shall abate in equal proportion between themselves.

Compare No. 1074, ss. 386-7.

Debts to be discharged forthwith.

Ib. s. 388.

(3) Subject to the retention of such sums as may be necessary for the costs of administration or otherwise the liquidator or official liquidator shall discharge the foregoing debts forthwith so far as the assets of the company are and will be sufficient to meet them as and when such assets come into the hands of such liquidator or official liquidator.

To be a first charge on the property of the company.

Ib. s. 389.

(4) All such wages or salary as aforesaid shall be a first charge upon all the property of the company of whatsoever description notwithstanding such property be mortgaged or charged to secure the payment of any moneys or that there be any lien upon the same. Provided that nothing in this subdivision of this Act contained shall be taken to affect the rights and priority of persons with respect to any property over which they held a mortgage charge or lien at the time of the passing of *The Companies Wages Act* 1885. [cf. 62 Vic. No. 24 (Q.), sec. 159].

(5) Such first charge shall include all costs awarded against any such company in any proceedings before a court to recover such wages or salary and any costs charges or expenses properly incurred in enforcing such order.

SCHEDULES.

FIRST SCHEDULE.

Section 2.

Number of Act.	Title or Short Title.	Extent of Repeal.
No. 1120 ...	<i>Mines Act 1890</i> ...	Sections seventy - three, two hundred and ninety-nine to three hundred and seventy-six both inclusive Thirty - third Schedule, Thirty-fourth Schedule, and Thirty-fifth Schedule.
No. 1189 ...	<i>Mines Act Amendment Act 1890</i>	The whole.
No. 1202 ...	<i>Mines Act 1890 (No. 2)</i> ..	The whole.
No. 1215 ...	<i>Mines Act 1891</i> ...	The whole.
No. 1251 ..	<i>Mines Act 1891 (No. 2)</i> ...	The whole.
No. 1263 ...	<i>Mines Act 1892</i> ...	The whole.
No. 1281 ...	<i>An Act to amend the Mines Act Amendment Act 1890 and the Mines Act 1891</i>	The whole.
No. 1384 ...	<i>Mines Act 1895</i> ...	The whole.

SECOND SCHEDULE.

Sections 31 and 101.

To the Honorable
The Minister of Mines.

day of 189

Sir,

I [or We] the [holder or holders of a miner's right or rights *give number and date*] beg to inform you that the holder [or holders] of a lease [*describe it*] has [or have] committed a breach of the covenants of the said lease by [*state how*] and I [or we] apply for an inquiry.

In the event of the said lease being declared void I [or we] apply for a lease of the land held under the said lease. [If part of the land is only required, the part should be described.]

I [or We] have lodged with the clerk of the warden [*or as the case may be*], whose receipt* is hereunder, the sum of Five pounds sterling as costs of the inquiry, if granted.

[*Signature and postal address.*]
the sum of Five pounds sterling as

*Received from
costs of the inquiry herein, if granted.

Clerk of the Warden.

THIRD SCHEDULE.

Section 108.

Mines Act 1897.

FORM OF WARDEN'S INJUNCTION.

(Form of Order obtained by a Corporation.)

Upon reading the affidavit of A.B. sworn the day of 18 [*state any other affidavits*], and on hearing the other evidence produced [*if any*] before me, I find that A.B. and C.D. [*name the persons to be enjoined*] are persons working in a mine mentioned in a mining lease made between Her Majesty of the first part and [*names of lessees*] of the other

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